EQUAL EMPLOYMENT OPPORTUNITY COMMISSION POLICIES REGARDING GOALS AND TIMETABLES IN LITIGATION REMEDIES

HEARINGS

BEFORE THE

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION POLICIES REGARDING GOALS AND TIMETABLES IN LITIGATION REMEDIES

TUESDAY, MARCH 11, 1986

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES,
COMMITTEE ON EDUCATION AND LABOR,
Washington, DC.

The subcommittee met, pursuant to call, at 9:16 a.m., in room 2261, Rayburn House Office Building, Hon. Matthew G. Martinez (chairman) presiding.

Members present: Representatives Martinez, Hayes, Hawkins, and Gunderson.

Staff present: Eric Jensen, staff director; Valerie White, legislative assistant; and Jeff Fox, assistant minority counsel.

Mr. MARTINEZ. The purpose of today's hearing by the Subcommittee on Employment Opportunities will be to receive testimony on the Equal Employment Opportunity Commission's policies and practices regarding the use of goals and timetables in title VII enforcement.

The Equal Employment Opportunity Commission, which is charged with the enforcement of title VII, has publicly voiced its opposition toward the use of goals and timetables, as well as statistical measures, in its remedies. This Commission has used its own interpretation of the *Stotts* decision to overturn the legality and application of the use of goals, timetables and statistical measures in enforcement practices, but nothing could be further from the current law.

The Supreme Court has, since the *Bakke* and *Swann* cases, reaffirmed the necessity for race and sex conscious remedies to overcome previous, and I underline the word "previous," discrimination.

Parroting the Justice Department's views that only recruitment and training qualify as legal affirmative action measures, while believing that mere recruitment and training can eradicate generations and generations of discrimination, the EEOC has set out to reverse 20 years of what I believe and many of us believe, to be sound civil rights policies.

The Commission has purposely confused the public with the argument that only identifiable victims of discrimination are covered under title VII's provision. The plain language of title VII refutes that interpretation by stating that a court, having found discrimination, may "order such affirmative action as may be appropriate, which may include * * * any other equitable relief as the court deems appropriate."

Clearly, the broad prospective equitable powers have been made available by Congress to enable the Government to seek remedies which will eradicate past, and I underscore the word "past," and future discrimination from the workplace.

Despite the EEOC's professed rightness of views on these policies, all six courts of appeals that have addressed the legality of the use of goals and timetables have rejected the EEOC's and the Justice Department's position on this issue.

In the meantime, despite Commissioner Alverez's hope that the public debate fostered by some Commissioners within the EEOC and the Justice Department "should not obfuscate the fundamental law enforcement mission to which this Commission has so vigorously and unanimously committed itself," this erosion of enforcement effort and spirit has already infected the EEOC.

Chairman Thomas' doubts about certain enforcement tools, and Acting Counsel Johnny Butler's statement that the regional attorneys should not acccept goals and timetables in conciliation remedies have clearly impacted the Commission's pursuit of these important remedy tools.

Government officials charged with enforcing the law should not take it upon themselves to decide that 20 years of civil rights law is suddenly no longer legal nor viable, and then argue that the issue is out of their hands until the Supreme Court renders a decision. In the meantime, all staff activity employing these devices has halted, and both plaintiffs and defendants are deprived of an equitable avenue of negotiated settlement.

As I have indicated in other forums, an agency which obstructs enforcement of the law, while fueling misleading debate on the matter, has abdicated responsibilities which it has been charged with. There is no excuse for this abdication; this suggests that the EEOC Commissioners seek to undermine the mission of the agency.

If so, then those members, I believe, should resign.

Before I turn to Mr. Hawkins for his statement, I would like to make an announcement regarding procedures. Because of time constraints, we are going to allow Johnny Butler, Acting General Counsel for the EEOC, to appear first, and then we will have Chairman Thomas, followed by the rest of the Commissioners.

With that I will turn to Gus Hawkins.

Chairman HAWKINS. Mr. Chairman, I will not take the time to read my written statement, which I would like to insert into the record. My statement outlines oversight activities that we have taken on the full committee. I think they parallel precisely what you have said.

I think we find substantive violations of the law, and this, I think, is unconscionable. I commend you for these hearings. They continue a long practice which we have had on this committee to monitor the Federal enforcement of fair employment laws.

It really is not a troublesome problem as long as people uphold the law. However, when they violate the law and proceed on their own ideology, that, I think, profanes the very nature of government itself.

I think you are correct in proceeding with these oversight hearings, and you certainly have the full support of the committee.

Mr. MARTINEZ. Thank you, Chairman Hawkins.

With that, I turn to Member Hayes.

Would you like to make a statement?

Mr. HAYES. Thank you, Mr. Chairman, but in the interest of time, due to the fact that we do have a markup in the full committee in 1 hour and 10 minutes, I think we ought to hear the witness.

Mr. MARTINEZ. All right. First I would like to call Mr. Butler, acting general counsel for the EEOC. Would you please come forward?

Why don't you proceed, Mr. Butler.

STATEMENT OF JOHNNY BUTLER, ACTING GENERAL COUNSEL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Mr. BUTLER. Mr. Martinez, my name is Johnny Butler, and I am acting general counsel of the EEOC. I am pleased to be here to talk about the operation of the office of general counsel with the subcommittee today.

I have no prepared statement. I am prepared to discuss the operation of the office of general counsel.

Mr. MARTINEZ. The first question I have for you is: Did you give a statement to the regional attorneys at the 1985 Baltimore regional attorneys conference, at the urging of Mr. Thomas, the chairman, and did you discuss this statement with Mr. Thomas before the actual meeting, and would you relate that statement to us?

Mr. BUTLER. Yes; I gave a directive to the regional attorneys of the EEOC not to submit any more cases with timetables. I informed them that this was a function of my assessment at the time, but I thought there were at least three commissioners, and probably four, who were opposed to the use of goals and timetables as a remedy in employment discrimination cases, and based upon my assessment of the direction of the Commission, I so instructed them.

Mr. MARTINEZ. As counsel you understand that your role is to represent the Commission and its policies. Has there ever been a vote regarding a policy direction on that particular issue by the Commission?

Mr. BUTLER. No; there has not been.

Mr. MARTINEZ. So, in other words, you established the policy yourself?

Mr. BUTLER. Well, I have an office to run. I find it very, very difficult, if not impossible, to respond to policy developments on a case-by-case basis. As a result thereof, I draw whatever inferences I can from the actions and conduct of the Commission on a case-by-case basis, and then I try to institutionalize that until such time as I can get final direction from the Commission.

Mr. MARTINEZ. I would assume that if I were counsel for a committee, and I am not a lawyer, but I would assume from my past experience in local government—because it disturbed me very much—that a counsel should not determine policy because that is not the purview of the counsel. But in my experiences, it has always been that when a counsel actually determined a policy, because of an inaction by a governing body, that governing body was very offended.

Did you actually discuss that statement with Mr. Thomas before the actual meeting?

Mr. BUTLER. I probably discussed it with Mr. Thomas very generally, but not, "Mr. Chairman, I am planning to do this. Is this OK?" I did not go through that kind of a dialog.

Mr. MARTINEZ. Did you discuss this with Mr. Zuckerman before the actual Baltimore meeting?

Mr. BUTLER. I discuss very few things with Mr. Zuckerman. I certainly did not discuss that.

Mr. MARTINEZ. Why did you decide to issue that statement to the regional attorneys?

Mr. BUTLER. Because we were proceeding, in my estimation, at a time in our law enforcement program where I thought I had effectively implemented management systems and litigation systems that would allow us to be more effective in our litigation activities, and I thought that our lawyers should concentrate more on identification of victims of employment discrimination and making whole those persons who had been victimized by discrimination, as opposed to behaving as they had done in the past, and not very carefully doing effective class analysis.

Mr. MARTINEZ. Well, I agree with you that that is a worthwhile goal and purpose, but do you feel that you should not enforce a law with which you disagree?

Mr. BUTLER. You are making a statement or you are assuming a statement that has not been addressed yet.

Mr. MARTINEZ. No; I am asking for an opinion. I am asking for your personal reflection.

Mr. BUTLER. Should I?

Mr. MARTINEZ. Let me restate the question. Do you feel that you should not enforce a law which you disagree with? I am just asking that.

Mr. BUTLER. Oh, no. My personal views on a law are of no moment.

Mr. MARTINEZ. Well, you are aware that the language section of 706(g) prohibits discrimination by employers and does not apply to courts which can impose any affirmative action as may be appropriate and any other equitable relief as the court deems appropriate. Then why are some of you misleading the public into thinking that these devices may not be used by courts?

Mr. BUTLER. I do not understand your question and/or statement.

Mr. MARTINEZ. Well, the law definitely states that a court can use any other equitable relief as the court deems appropriate. Some of the statements that you made at Baltimore are misleading the general public into thinking that these devices cannot be used by the courts, when, in fact, they can be used.

Mr. BUTLER. Well, it was never my intention to mislead the public or mislead our regional attorneys. Rather, it was my intention to give the regional attorneys some guidance on how they would manage their litigation dockets.

There are a whole array of remedies that are permissible under the title VII statute. Even our affirmative action guidelines suggest that affirmative action of the nature of goals and timetables might be considered. There is nothing mandatory or obligatory about goals and timetables. It is one of many remedies that can be considered.

In my estimation, we have not in the past, certainly in the days prior to our statement of enforcement policy and statement of remedies policy; we have not in the past effectively addressed "make whole" relief to identified victims of employment discrimination. Rather, we have concentrated, in my estimation, more on goals and timetables and not enough on relief for identified victims.

Mr. MARTINEZ. What are your personal views about goals and timetables?

Mr. BUTLER. Well, not to be flippant, you know, I take the position that indexes, proper indexes, proper thermometers, proper barometers, can and should be used to assets the indices of discrimination. I do not feel that statistical indexes should be used as ceilings in terms of relief for entitlement. I do not think that numerical indexes should be considered conclusive proof of employment discrimination.

I think statistical indexes, numbers, goals, timetables, the whole array, it is just a part of the whole arsenal that we have, No. 1, in determining whether discrimination exists; and, No. 2, in remedying that discrimination.

Mr. MARTINEZ. In your statement it seemed like, in your mind anyway, and correct me if I am wrong and if I am assuming too much, the setting of a goal or timetable is the setting of a ceiling or a limit.

Mr. BUTLER. Well, as a practical matter, that can, in fact, be the case. I am repulsed by the use of goals and timetables in such a manner that they become a ceiling.

Mr. MARTINEZ. I do not want to get into a long dissertation on this particular point, but it disturbs me that people within the Commission, people with positions like yourself, have all of a sudden decided to construe goals and timetables as limits.

Now, I would suggest that goals and timetables are not limits; that every one of us as individuals has to set goals for ourselves and has to set a reasonable time frame in which to accomplish those goals. That is a part of life.

Now, in many cases, classes of people have been ordered by the court to establish timetables and goals to relieve past discrimination. That is not setting a limit nor is it setting quota, as Brad Reynolds suggested the other day. It is not a quota. It is something to strive for, something to attain.

Once a goal is attained, you can set the goal higher and farther, but even within those bounds there is something that certain members of the Commission and the Chairman does not understand: that when you have achieved your first goal and your first timetable, that even within that framework there is going to continue to be some discrimination because in some cases the law may impose remedies on an employer who would otherwise be unwilling to accept that remedy.

That being the case, the employer might continue to discriminate in specific cases, and then I say yes, we ought to pay attention to that, too. But we should not forsake the one at the expense of the other.

I think that, as a Commission charged with the responsibilities and duties of enforcing title VII, you must pursue all of it. But let me ask you: in your mind are "make whole" and prospective relief exclusive?

Mr. BUTLER. They are not mutually exclusive. At best they are conjunctive kinds of relief.

Mr. MARTINEZ. All right. Give me a specific example of when goals are ceilings or quotas.

Mr. BUTLER. When you say, "I have got two blacks, and we do not need any more."

Mr. MARTINEZ. The timetables and goals policy says that an employer will, by a certain time, set a plan on a voluntary basis, unless imposed by the court, to remedy some situation. Nobody said to that employer, "Hey, if I have got two, I have got enough." But in your mind, as counsel for the EEOC, EEOC Commissioners ought to be able to come back and say, "Oh, no, that is not enough."

Mr. BUTLER. Mr. Martinez, I think we are addressing both a conceptual framework and a practical framework. I think the conceptual framework, you and I agree 100 percent. As a practical matter, if, in fact, we do not monitor statistical indexes, then statistical indexes are manipulated. And I am suggesting to you that we have an obligation whenever we use statistical indexes to make certain that they are being utilized solely for the purpose of an index, to evaluate the existence or nonexistence or continuation or the termination of discrimination. It is for no other purpose.

Mr. MARTINEZ. You are absolutely right, and that is the responsibility of the Commission: To monitor employment discrimination, to make sure that it does not occur. That is the existence and the justification of the EEOC.

But to say because, theoretically, goals and timetables can be abused, we should abandon their use is not specific enough. What I asked you for initially was a case. Give me a case in which the Commission has found that an employer who established timetables and goals and, after attaining a certain amount of employment in a certain amount of time, reverted and said, "That is enough. That satisfies"——

Mr. BUTLER. I will give you one slightly better than that, a case in which there are several hundred black applicants for a job, and the decision is made to only employ black applicants at the availability level even though there might be three or four times as many blacks as should have been employed above the availability level.

Mr. MARTINEZ. Is that a specific case, somebody you can actually refer to who did that?

Mr. BUTLER. I'm just giving you a factual pattern. You wanted me to give you some facts.

Mr. MARTINEZ. Well, I am asking because we can debate back and forth on what is justified and what is not justified, but when so many times we are required to make a case, especially in a court of law, we are required to give factual evidence.

So what I am saying is: Is there a particular instance that has come before the Commission or the Commission's attention where that specifically happened?

Mr. **Butler**. I am not prepared at this time to present you with facts respecting a specific case, Mr. Chairman.

Mr. **Martinez**. Could you provide that information at some time?

Mr. **Butler**. I will look and see and probably could come up with one. If I can, I will submit it.

Mr. **Martinez**. All right. Let me turn now to the Honorable Gus Hawkins.

Chairman **Hawkins**. Mr. Butler, during site visits by my committee staff to several EEOC district offices, they learned that regional attorneys offices, had been instructed to cease recommending the use of goals and timetables in future consent decrees and also those cases in which the Commission is currently a party. Did you so instruct the regional attorneys to do that?

Mr. **Butler**. To reiterate, Mr. Hawkins, I informed the attorneys that I did not want them submitting any more cases to me with goals and timetables, and I did that back in October.

Chairman **Hawkins**. Then the answer is yes?

Mr. **Butler**. Yes.

Chairman **Hawkins**. Under what authority did you do that? Had you been advised by Chairman Thomas or any other Commissioner to issue such instructions?

Mr. **Butler**. I am the acting general counsel of the agency, and as I read the statute, I am in charge of enforcement litigation. Once the Commission authorized litigation, I am to conduct that litigation based upon the Government legal standards and policy as promulgated by the Commission.

It was my view, based upon my interaction with the Commissioners over the last several months, that the Commissioners would no longer be interested in my approving resolutions of cases with goals and timetables, and based upon that, I made a decision to direct them not to submit any more cases.

Chairman **Hawkins**. Are you saying it was solely your decision and not that of the Commission or Chairman Thomas?

Mr. **Butler**. Well, Mr. Hawkins——

Chairman **Hawkins**. Would you answer?

Mr. **Butler**. I don't want to——

Chairman **Hawkins**. Well, you are giving me a long——

Mr. **Butler**. I want to be careful not to misstate.

Chairman **Hawkins**. This is a very simple question and all it requires is a simple answer. Where did you get the authority to issue such a directive?

Mr. **Butler**. From myself.

Chairman **Hawkins**. Was it yours?

Mr. **Butler**. For me.

Chairman **Hawkins**. Was it the Commission's?

Mr. **Butler**. Johnny Butler, acting general counsel.

Chairman **Hawkins**. So you take full responsibility for having issued such instruction?

Mr. **Butler**. Yes, I do.

Chairman **Hawkins**. Now, in view of the fact that you took this upon yourself, would you give us a rationale for issuing such directive? Was it based on your reading of the law, was it based on your interpretation of what you thought the Commission conceived the law ought to be, or just on what basis?

Mr. BUTLER. Mr. Hawkins, one of the problems with functioning at a lower rung in the bureaucracy is you are beholden to people at a higher place in the bureaucracy. As such, I have to rely upon the Commission for policy direction.

The Commission gives policy direction in one of two ways: Their express policy statement, like our statement of enforcement policy, like our remedies policy, or their vote on cases once a week. There has been a continued——

Chairman HAWKINS. Mr. Butler, you seem to be saying something directly opposite to what you previously have said. Are you interpreting Commission policy?

Mr. BUTLER. And that is not different from what I said.

Chairman HAWKINS. Well, you just said that you took full responsibility for having issued those instructions. Now you seem to be saying that——

Mr. BUTLER. No, Mr. Hawkins.

Chairman HAWKINS. Are you interpreting Commission policy?

Mr. BUTLER. You asked me two questions: One, what was the basis or I mean what did I do; and the second was the rationale. I told you I made the decision based upon my authority to conduct enforcement litigation, but the rationale for that decision was based upon my perception of the position of the Commissioners.

Chairman HAWKINS. That seems to contradict your previous statement. Now you are talking about your perception of Commission policy. That obviously did not motivate you to issue those instructions because you say you had full authority to do so and you did so.

Mr. BUTLER. And I did it at——

Chairman HAWKINS. Let's leave the Commission out of the discussion for the time being. On what basis did you conclude that that was the law and that consequently you could issue such instructions to the regional attorneys?

Mr. BUTLER. To reiterate, Mr. Hawkins, once the Commission authorized litigation, as the statute required, I file a lawsuit, and I manage that litigation. That litigation, in my estimation, has to be managed utilizing two indexes, one of which is my assessment of the governing legal standards, the other of which is my assessment of the policy of this Commission, and I am saying to you that with respect to the question of goals and timetables, the management of that aspect of the litigation function was based upon my assessment, though not formally declared or proclaimed, but my assessment of what I perceived to be the Commission's position.

I was not functioning in a whimsical fashion, albeit I was not functioning as——

Chairman HAWKINS. Would it be true to say that you were relying then upon an inference of the Commission's position on goals and timetables?

Mr. BUTLER. Yes, sir; that is exactly correct.

Chairman HAWKINS. Well, that is quite different from asserting that you felt that you had the legal authority yourself to issue that, and it was not a directive from anyone.

Then you imply indirectly that that was what you thought the Commission wanted you to do; is that true?

Mr. **Butler**. Exactly, sir.

Chairman **Hawkins**. All right, then do you consider the use of goals and timetables and your position with relief to specific victims of discrimination mutually exclusive or do you feel that as the acting general counsel of this agency, carrying out the intent of the law and of Congress' intent, that you could proceed to do both adequately.

Mr. **Butler**. Beyond question.

Chairman **Hawkins**. Without getting into a problem as to one or the other?

Mr. **Butler**. Beyond question, but I think it is critical, Mr. Hawkins, that whenever you use whatever remedial measures that are available under section 706(g) of the title VII statute, one must be very, very, very careful that moving from the conceptual framework to the practical utilization of these things, that you do not, one, play havoc with the organic aspect of the statute; and second, that as a practical matter, you are not doing more harm than good to the——

Chairman **Hawkins**. Now you are getting into conjecture. Do you believe in goals and timetables, do you think that the law requires that as a legal remedy, and are you proceeding to use it?

Mr. **Butler**. Mr. Hawkins, you have asked me three questions, and I do not want to be boxed in again in implicitly giving you——

Chairman **Hawkins**. I will ask you one question then. What is your position with respect to goals and timetables? Do you believe in goals and timetables?

Mr. **Butler**. I think goals and timetables can be a proper remedy under the title VII statute, provided, however, with the emphasis on this proviso, that they are used properly. There is a tremendous problem with the misuse of goals and timetables. There is a tremendous problem with the misuse of the statistical framework. There is a tremendous problem with the failure to eliminate the underlying——

Chairman **Hawkins**. Mr. Butler, you are not answering the question now. You are getting into the misuse of goals and timetables.

Mr. **Butler**. But I think, Mr. Hawkins——

Chairman **Hawkins**. The Ten Commandments can be abused and misused. Anything can be abused.

I am asking you: Do you personally believe in goals and timetables?

Mr. **Butler**. The answer is yes, with a proviso.

Chairman **Hawkins**. Well, your proviso says that you do not believe in them because you are saying that they can be misused. We know that. We do not have to be told that. That is a very simple, axiomatic occurrence every day, I guess, with all of us.

But we are asking you if you believe in goals and timetables, and not getting into a proviso of any kind. Why would you issue instructions to regional attorneys which, in effect, says "Do not use goals and timetables"? You did not, as such, tell them, "Use them, but be careful that you use them legitimately; be careful in the manner in which you use them." That was not the instruction.

The instruction that went out did not say, "Use goals and timetables carefully." It simply says, "Do not use them." That is the impression that has been given.

Mr. BUTLER. Mr. Hawkins——

Chairman HAWKINS. I can understand if you you believe goals and timetables to mean that regional attorneys should not recommend the use of them in consent decrees. That is precisely what has happened.

Mr. BUTLER. Mr. Hawkins, I am counsel for the Commission. My personal views are of no moment. I advocate the position of my client. I have advocated the position of my client as I best understand that position.

I do not determine a conscious level and direct that conscious level. I first find out what the conscious level of my client is, and I advocate that. That is what I have done.

Chairman HAWKINS. Mr. Butler, the Baltimore Sun recently quoted Commissioner Webb as saying that the Commission's policy should not be made through some ad hoc decision promulgated by the general counsel.

Now, that would suggest that you acted improperly, and I might add, possibly illegally. Do you believe that you acted on an ad hoc basis in your view that goals and timetables are no longer sought by the Commission, or just how was your decision reached? Did you reach your decision from some specific act of the Commission?

Mr. BUTLER. To reiterate, Mr. Hawkins, as the general counsel, once a week I present litigation recommendations to the Commission. The Commission votes. Over a period of time, I draw inferences on those votes respecting the policy direction, the policy focus of the Commission, and at some point in time I will synthesize those positions, and then I will begin to conduct my litigation program accordingly.

The handling of the question of goals and timetables was very much in line with how I have approached a number of issues in terms of developing and managing litigation. So the answer to your question, it was not being, you know, clairvoyant. It was not being one possessed with the requisite acumen to make some assessment from gazing through a crystal ball. It was basically based upon a week-by-week assessment.

See, one of the things, Mr. Hawkins, you have got to understand, for whatever reason, this Commission chooses not to get into a lot of broad, sweeping policy developments. On the other hand, however, this Commission is very careful to say, "Do not interpret votes on an individual case."

I have an office to run. I have an activity to manage, and I cannot sit around. I have got to move. I am in a dynamic milieu, and as such, I have got to give it my best shot, and that is what I did in this particular instance.

Chairman HAWKINS. We appreciate that, Mr. Butler, but we would hope that you would give it your best shot in upholding the law and not always veering away from it.

But let me ask you this. Have you referred cases to the Commission which contain goals and timetables?

Mr. BUTLER. I cannot recall a case as a practical matter Mr. Hawkins.

Chairman HAWKINS. You cannot recall a case which contains goals and timetables?

Mr. BUTLER. As a practical matter, Mr. Hawkins, with the very rare exception, outside of the context of settlement agreements on systemic cases, outside of the context of enforcement of settlement agreements or conciliation agreements in a case under section 703, these matters will never be brought before the Commission.

Chairman HAWKINS. Well, is your answer yes or no?

Mr. BUTLER. I said I cannot recall having presented, and I was explaining to you the parameters.

Chairman HAWKINS. Well, is your answer that you cannot recall a case containing goals and timetables?

Mr. BUTLER. Right, I cannot recall a case involving those——

Chairman HAWKINS. Do you recall the *Hi Point* case which was recently before the Commission? Did you refer that case?

Mr. BUTLER. That case is currently before the Commission.

Chairman HAWKINS. Does that case contain goals and timetables?

Mr. BUTLER. I think it does.

Chairman HAWKINS. Well, then you have referred a case containing goals and timetables?

Mr. BUTLER. No.

Chairman HAWKINS. Well, that was not your previous statement. All right. Thank you, Mr. Butler.

Mr. MARTINEZ. Thank you, Chairman Hawkins.

At this time I turn to Mr. Hayes.

Mr. HAYES. Thank you, Mr. Chairman. I have a couple of questions. The first question has two parts to it.

How long have you occupied the position in the Department as acting general counsel?

Mr. BUTLER. It will be 21 months next week.

Mr. HAYES. And how did you get the position?

Mr. BUTLER. Chairman Clarence Thomas appointed me acting general counsel June 25, 1984.

Mr. HAYES. I understand that Chairman Clarence Thomas instructed you not to recommend cases containing goals and timetables; is that correct?

Mr. BUTLER. Chairman Thomas and I have had conversations where he has, in fact, expressed his concern respecting goals and timetables.

Mr. HAYES. Are you saying that you concluded that the usage of goals and timetables have not worked?

Mr. BUTLER. I am not saying that at all. If you would like for me to address that, I will address that.

Mr. HAYES. I would like for you to.

Mr. BUTLER. OK. In some respects they have worked. In other respects they have not.

Mr. HAYES. Are you suggesting that the courts through the Justice Department are a better remedy to provide equal employment opportunities or halting discrimination?

Mr. BUTLER. I do not understand the question, Mr. Hayes.

Mr. HAYES. Are you suggesting that the courts are the better course of remedy through the Justice Department to provide an end or a resolution to questions regarding employment or job discrimination?

Mr. Butler. I have no views whatsoever respecting the enforcement effort at the Department of Justice. I have enough problems trying to stay on top of what is happening at the EEOC. I just do not have a view.

Mr. Hayes. What do you see as the alternative to uses of goals and timetables as a measurement of change when the charges of discrimination have been made?

Mr. Butler. Mr. Hayes, I think that if goals and timetables are properly used, then you do not need to consider anything else. If goals and timetables are improperly used, then I think one needs to focus very substantially on elimination of employment discrimination and making whole those persons that have been victimized by discrimination and implementing monitoring procedures, monitoring apparatus, that will, in fact, give you some indication on a fairly frequent basis of instances of discrimination.

Mr. Hayes. I know you have had conversation with the Commissioners about the use of goals and timetables. Would you care to share that or the basis of those discussions?

Mr. Butler. No, I would not care to share those conversations, other than to suggest that based upon those conversations I reached a conclusion last fall that there were three, possibly four Commissioners, that were opposed to them.

Mr. Hayes. Thank you, Mr. Chairman.

Mr. Martinez. Thank you, Mr. Hayes.

I would simply conclude with this witness by saying I think you are absolutely right that there can be abuses to anything and that there may be abuses to timetables and goals, but I also charge that it is your responsibility as counsel to follow the direction of the Commission.

In my opinion, you do not have the right to make policy decisions of the nature we are discussing without a formal vote by the Commission that would establish guidelines from which you would operate.

If timetables and goals are abused, then the EEOC is charged with the responsibility of making sure that the abuses are corrected. Title VII is a piece of legislation that was passed with the intention of eradicating mass discrimination, and it has done so. I look at timetables and goals as a mechanism for people that have been denied equal opportunity access for so long, that, once they get their foot in the door, their problems are not necessarily eradicated. Their problems are going to continue. It is then up to us to pursue specific cases where employers try to subvert the law.

It is our responsibility as Government officials to make sure that they do not. That is simply all I have to say.

I would ask one last question because I think it is very important. Do you believe that discrimination against blocks of people, certain groups of people, has been eradicated completely in the United States?

Mr. Butler. Under no circumstances. Racism, bigotry, sexism are political, economic and social realities in this country. It was that way yesterday, and it was that way today, and it will be that way tomorrow.

Mr. **Martinez**. So then, we that are embarrassed by that as American citizens should continue, especially when we are in positions of authority, to fight it every way we can.

Mr. **Butler**. I agree with you wholeheartedly.

Mr. **Martinez**. Thank you. Thank you very much for appearing before us today, Mr. Butler.

With that I would like to call Chairman Clarence Thomas. I am just calling for the chairman himself at this time.

Chairman **Thomas**. Mr. Chairman, with your indulgence, we operate as a Commission, and I would like the whole Commission to appear with us. It was our understanding that we would appear as a panel.

Mr. **Martinez**. No. We actually were asking you to appear to make the statement that you have got to make. The panel indicated that they would submit written testimony to us, and that they would be available to answer questions.

Would you proceed, Mr. Thomas?

STATEMENT OF HON. CLARENCE THOMAS, CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Chairman **Thomas**. Good morning, Mr. Chairman, Mr. Hawkins, Mr. Hayes—I have submitted for the record a prepared statement. I have no more to add to that statement.

There are two areas of concern, however, and that is, one, the confidentiality of charges under investigation or under consideration by the Commission; and second, the confidentiality of specific cases considered by the Commission which, if discussed here, I think we are in the position of waiving certain rights in the litigation of those cases.

Mr. **Martinez**. Very well. We understand that.

I read your testimony last night, and there were several things that came to mind, but the most consistent thread throughout your testimony is your admirable concern about timetables and goals being misused and being set as limits, as we discussed with Mr. Butler.

Somewhere along the line, we had to arrive at a certain point, and the last question I asked Mr. Butler was whether, in his estimation, all discrimination against blocks and groups of people has been eliminated; he said absolutely not, emphatically not; that racism and bigotry still existed to a great extent.

There are certainly pockets in these United States where discrimination is going on right now, at this very minute. Now, how do we accomplish—without goals and timetables the elimination of that kind of discrimination toward large groups of people. If we wait for one individual to be specifically discriminated against, and wait for that person to muster courage that many people do not have to come forth and say, "I was discriminated against," can that individual be used as a test case to change all of the discrimination that has happened in the past? How do we get to that point without the use of timetables and goals?

Mr. **Thomas**. Mr. Chairman, I think it was clear in my testimony that there is more to it than just one individual walking into the

Agency. We have spent the last almost 4 years pushing very hard to make the Agency effective.

I want to comment here that there seems to be a misunderstanding as to the monitoring even of the previous consent decrees that contained goals and timetables. I implemented the program to regularly monitor those. So I do not know how anyone can suggest that those consent decrees have either been a failure or successful without that monitoring.

But let's go back. We have not only implemented a very aggressive enforcement program for the cases that come through our door. It has taken us quite some time, but we are at a point where our systemic program, our pattern and practice program can be very effective. We have revamped the entire program. We have gone through all of the efforts, and I will not give you the litany of them here, but a number of them are included in my prepared statement. We have gone through major efforts to build the infrastructure that we think is necessary to adequately, properly, effectively and efficiently enforce title VII, as well as the other statutes under our jurisdiction.

Now, for example, in the area of age, we do not use goals and timetables. We certainly do not use it in the area of the Equal Pay Act, but the fact of the matter is we have to deal with those cases also. We cannot just prefer one.

With respect to discrimination, I think it is nice to have platitudes about discrimination. I grew up under raw segregation. I know what it is like to be treated negatively based on race. I think that that is a cancer in our society. I have so stated on numerous occasions.

I do not think, however, that we should get ourselves in the position where all we are doing is adjusting social patterns, adjusting numbers, playing games with statistics and goals and timetables, et cetera. We are dealing with real human beings out here, whether they are white, black, Mexican Americans, Hispanic, male or female, handicapped.

So we have a broad mandate to make sure that those bases within our jurisdiction, sex, age, national origin, religion, handicap, are not used as bases for employment decisions or as reasonable factors for employment decisions, and that is precisely what we are doing and will continue to do, I might add.

Mr. **Martinez**. Let me ask you specific questions because we heard in Mr. Butler's testimony that he made what I believe was tantamount to a policy decision. He said that it was not a policy decision on his part, but a decision that was interpreted as a policy of the Commission, although I understand there was never any formal vote on that particular order to abstain from filing any timetable and goals in negotiated suits.

So let me ask you: Did you participate with Mr. Butler in making the decision not to use timetables and goals in the EEOC suits?

Chairman **Thomas**. I make it a point to let other people in positions of authority who do not report directly to me to operate independently. There is no policy requiring the use of goals and timetables, nor is there a law requiring the use of goals and timetables.

There are a series of remedies which we can ask for and receive or negotiate in cases of discrimination.

The Commission has a range of views on these. All of these views include some concern at some level about the misuse or the use of goals and timetables. Johnny Butler has been the acting general counsel for almost 2 years. I think he understated what he said, we only met once a week. We have met as often as twice a week on many occasions. We have considered literally hundreds of cases, and he has presented most of them.

He has to make a determination, one, based on broad policy that we implement, whether or not that policy includes, for example, the enforcement policy, the remedies policy. He has to implement those broad policies.

There is a second point that he made. He said that he has to look at the large number of cases which he presents and somehow determine whether or not he, in his judgment, should bring certain types of cases, request certain types of remedies. This does not just apply to the issue of goals and timetables. It applies to other areas that are equally or more complex on the liability side as opposed to the remedial side.

Mr. MARTINEZ. From the statement you just made, it sounds like you did give him his edict on goals and timetables and that your edict was not to pursue that.

Chairman THOMAS. I did not give Mr. Butler any edict.

Mr. MARTINEZ. Well, when you state emphatically that this is the least of our priorities and the least of the things that we should be pursuing and that is what——

Chairman THOMAS. Pardon me, Mr. Chairman?

Mr. MARTINEZ. If I generalize incorrectly, correct me, but the inference I draw—and if I were Mr. Butler, I could understand how he drew that inference—is that timetables and goals are the least of the priorities that you have to deal with, and since it is evident that you are not a champion of timetables and goals, you really do not particularly care whether they get used or not.

Chairman THOMAS. Mr. Chairman, we have been through the issue of goals and timetables on previous occasions at our Commission. The first case in which we had a direct vote on that was the *Beecher* case, which was similar to the *Williams* case. At that time, the vote was four to one, as I remember, in favor of goals and timetables.

Clarence Thomas went to the Justice Department, as well as to other areas in this Government, and championed the position of——

Mr. MARTINEZ. Let me interrupt. Would you repeat that last statement you just made, the vote on a particular case?

Chairman THOMAS. That was almost 4 years ago.

Mr. MARTINEZ. It was 4 years ago on the use of timetables and goals?

Chairman THOMAS. That is right.

Mr. MARTINEZ. It was four to one. Now, I want you to pay particular attention to that statement because Mr. Butler's testimony indicated that he issued that order to the regional attorneys based on his perception of what the Commission's feelings are with regard to goals and timetables. I think it is conclusive that he felt that timetables and goals as a remedy should not be pursued, and I revert again to the fact that he said it was based on votes that were taken and perceptions that he drew from the Commission's feelings on timetables and goals.

Yet you are stating right now that four to one the Commission voted in favor of using timetables and goals, which would indicate to me that a definite policy was established in favor of the use of timetables and goals.

Chairman THOMAS. As I indicated, that was 4 years ago, and there are two things to be recognized. One, Mr. Butler was not general counsel or acting general counsel at that time; and second, the composition of the Commission was different.

Mr. MARTINEZ. All right. Let me ask you this. In the testimony that you provided for us, you did not really address—nor have you addressed throughout this hearing—whether you believe goals and timetables are acceptable under the law. You said that the use of goals and timetables is not required by law specifically, and you are absolutely right, but by the same token, goals and timetables have been suggested as a remedy, and have been actually used by the courts.

So let me ask you a question. Do you believe that they are acceptable under current law? Are they acceptable, the use of timetables and goals?

Chairman THOMAS. The Supreme Court, as I understand it, circuit court of appeals or a number courts of appeals have used goals and timetables, although they do not require the use of goals and timetables. The Supreme Court——

Mr. MARTINEZ. The question is: Are they acceptable?

Chairman THOMAS. The Supreme Court is to decide that issue. Obviously if the courts uphold them in those particular circuits, they are acceptable. The Supreme Court has ruled in a number of cases. They certainly have not indicated in the *Stotts* case they are acceptable in all instances.

Mr. MARTINEZ. The *Stotts* case did not say that. That is where the big difficulty comes in, in the misinterpretation of that.

Mr. THOMAS. It is my interpretation or it would be my interpretation of current law, the way I read *Stotts*——

Mr. MARTINEZ. The *Stotts* case was a declaration that the seniority was valid. That is all it was.

But still, you are saying to me that you are waiting until certain decisions are made by the Supreme Court and we must all hold bated breath for the Supreme Court to make a decision. Until the Supreme Court makes that decision, I ask you again: Is it acceptable now?

Chairman THOMAS. To me they are not. The way I read *Stotts*, the broad way, I think that goals and timetables, as implemented, wind up eventually or result in the consideration of race or sex, and I think title VII on its face says that is not to be done.

Mr. MARTINEZ. Then it is definitely your opinion that timetables and goals are not a proper use or remedy?

Chairman THOMAS. That is my opinion, although I will not necessarily say that that is shared by every Commissioner.

Mr. MARTINEZ. All right.

Chairman THOMAS. And I think I have so stated that on past occasions.

Mr. MARTINEZ. Then let me ask you a question. The Commission consists of one chairman and four commissioners. But is its chairman of one vote and one rule, or is it Chairman of Commission votes? Is Commission policy established by Commission vote?

Chairman THOMAS. That's right. The Commission, we have five Commissioners.

Mr. MARTINEZ. So the balance of the Commission could change a position, a policy position?

Chairman THOMAS. Pardon me?

Mr. MARTINEZ. A change of votes of the balance of the Commission——

Chairman THOMAS. Well, if you count your votes, three to two wins. In many instances, it is four to one.

Mr. MARTINEZ. So regardless of what the law says and the Congress has expected, the Commission does not have to adhere to anything except its own policy established by a majority vote?

Chairman THOMAS. I think that is totally misreading what I am saying. The Commission——

Mr. MARTINEZ. Well, that is what is happening actually.

Chairman THOMAS. That is not true, Congressman. What we have attempted to do is to grapple with very difficult issues across the board. We attempted to do that without engaging in a lot of the rhetoric. That has been difficult on this particular issue because passions do flare with respect to goals and timetables.

We have attempted not to debate it in public. We have attempted to debate it at our Commission in a reasonable way as reasonable people, as people who have reasonable disagreements, and we have attempted to make sound policy in all areas.

Mr. MARTINEZ. In the *McMillan* case, the EEOC signed a consent decree with a provision that the EEOC take no position with regard to hiring goals, and that it will not participate in its enforcement. Can you tell me why this occurred?

Chairman THOMAS. The Commission does not review consent decrees. The general counsel makes that decision. That was a case in litigation.

Mr. MARTINEZ. That was a case in litigation, but the EEOC did sign a consent decree.

Chairman THOMAS. The general counsel or his regional attorneys or whoever is handling the case who reports to the general counsel makes a determination in those cases.

The general counsel has given you the basis, with which I agree, of his opinions in this particular area. I was not aware of that provision in the *McMillan* case prior to its being signed.

Mr. MARTINEZ. Here again, correct me if I am wrong and assuming too much, but it sounds like the EEOC has not applied goals and timetables for a while. How long have they not applied timetables and goals?

Chairman THOMAS. In the Federal sector, we have goals and timetables in our management directives, and I have made the decision and made the decision 4 years ago that I would implement that as aggressively as possible.

In earlier decisions, and I cannot go back and reiterate them; some are confidential; others, I believe, involve litigation, and again, this has not been an issue that has come up very frequently, but there have been goals and timetables, particularly during my earlier tenure.

Mr. **Martinez.** At this time I would like to turn to the Honorable Chairman, Mr. Gus Hawkins.

Chairman **Hawkins.** Thank you.

Mr. Thomas, in the *June Meyer* v. *McMillan Publishing Company* case, the following language was included in the consent decree: "The EEOC takes no position with regard to section 7 of this decree pertaining to goals and will not participate in its enforcement."

If the Commission has no policy on goals and timetables, has adopted no set policy or does not have it informally, could you tell us what you believe to be the basis for this disclaimer?

Chairman **Thomas.** I think the general counsel has done an admirable job in explaining what his position has been on it. That is his determination. I was not aware of the *McMillan* case until I saw it published and discussed it subsequent to the signing with the general counsel. I was not aware of the disclaimer.

He has attempted to give you his basis for exercising his authority to add those kinds of provisions. The Commission makes broad policy in certain areas. In the areas of remedies, we have attempted to ask for different types of remedies, and we think we have the authority to and the discretion to seek different types of remedies. We do not think we are required to seek goals and timetables.

I think the general counsel simply, from his experience before the Commission, which is on a very regular basis, and his discussions perhaps informally with the individual Commissioners, felt that it would not be the view of the majority of the Commissioners to include goals and timetables in those particular consent decrees.

Chairman **Hawkins.** Do you know of any specific policy that the Commission has taken with respect to goals and timetables?

Chairman **Thomas.** The Commission has——

Chairman **Hawkins.** Has the Commission approved, disapproved or taken no position whatsoever with respect to goals and timetables?

Chairman **Thomas.** Other than perhaps in the affirmative action guidelines, I do not think—and there may be some mention of it in our compliance manual—the Commission has, to my knowledge, ever taken a position pro or con either before my tenure or subsequent to the beginning of my tenure on that particular issue.

Chairman **Hawkins.** So everybody in the Agency——

Chairman **Thomas.** As a matter of policy.

Chairman **Hawkins.** Does everyone in the Commission have their own views with the enforcement of title VII? Does the general counsel interpret what he or she considers to be the law on an ad hoc basis? Am I describing the actual situation with respect to the Commission's policy on goals and timetables?

Chairman **Thomas.** Mr. Hawkins, we have an administrative agency. As one Commissioner described it, we have the worst of all worlds. We have an administrative agency and a quasi judicial agency. We have an enforcement function of an administrative agency, and we have the subsequent burden of obviously being a member of the executive branch.

But in addition to setting policy, as the EPA or any other executive branch agency, we have the responsibility of voting, five members voting, on individual cases, on individual actions that come before us.

Now, I do not think that anyone would suspect that a five member body that votes on individual cases would be monolithic in its point of view or that it would not change. If it were an enforcement agency, such as the EPA, I think you could expect broader policies, enforcement policies, in virtually all areas.

Chairman HAWKINS. Well, are you saying that there is no necessity for this Commission to take a definitive position on a policy itself, not simply in interpreting individual views of Commissioners. I believe the Commission's policy with respect to goals and timetables is an important one.

Chairman THOMAS. Mr. Hawkins, at EEOC that issue, as important as the debate rages in the public eye, that issue very rarely comes up either pro or con.

Chairman HAWKINS. Well, is that the explanation of why there is so much confusion about goals and timetables and why it is so difficult for us to even monitor the Agency? If the Commission has no policy whatsoever on what is obviously one of the most important issues before the Commission, would you suggest that a policy should be taken so that not only the agency and its personnel, but the public as well, should know what that policy is. Hence, we would not have to go around and around in these oversight hearings on whether or not and, if so, "who done it" in every instance?

Chairman THOMAS. Well, Mr. Hawkins, I think in our enforcement efforts, in what we are attempting to do, I do not think in many of the areas, in the age area, in the other areas of title VII, everything is perfectly clear. If it was perfectly clear, the Supreme Court would not be grappling with it again or the courts of appeals would not disagree.

But we are grappling with a very difficult issue. We have attempted to grapple with it in as professional and reasonable manner as we could, respecting all of the views and all of the law that has been developed in these areas.

Beyond that I cannot say much more. I do know that policy has to be developed, and we are very sensitive to that. I think the policy should be developed not in reaction to public opinion or furor, but as responsible members of the Commission, and we have attempted to do that and to stay above the maddening crowd on this particular issue.

Chairman HAWKINS. Well, I do not know that you are doing such a good job when we find in selected EEOC district offices across this country that your field staff is confused on precisely what the Commission's policy is on goals and timetables. The impression EEOC field staff have is that they have been instructed against the use of goals and timetables. That seems to be the general impression across this country. It certainly is the impression of Members of Congress that the EEOC believes that goals and timetables are out.

It would seem to me, in view of that impression, that you would help us out by making it plain and clear whether or not goals and timetables are out or whether or not they are to be used in negotiations and settlement agreements. How can employers across the country, in trying to comply with the law, do so if they are not so sure what you mean?

I think that is pretty evident. It certainly is evident to us. Even after oversight hearings, such as this one this morning, can we arrive at any definitive conclusion on the Commission's policy on goals and timetables. The acting general counsel has, in effect, instructed the regional attorneys to discontinue recommending or including goals and timetables in litigation in many instances. Now, we are not so sure just where he got that instruction or authority to issue such a directive.

Would you answer then specifically: Did you ever instruct the acting general counsel to take such positions and to issue such instructions?

Chairman THOMAS. I am certain that I have expressed my views to Mr. Butler about as strong as I have expressed them to you. Mr. Butler has a mind of his own.

Chairman HAWKINS. Well, I am not getting into his mind or his interpretation. I am simply asking you: Have you ever instructed him or recommended to him to issue such instructions?

Chairman THOMAS. No, I have in perhaps one specific case raised serious questions about the appropriateness of that particular remedy and probably expressed it, but that was after the fact.

I have sent cases back to the field to be looked at again, but I have never issued instructions to Mr. Butler to issue a unilateral order, to my recollection, that no goals and timetables ever be included in anything again.

Chairman HAWKINS. Well, then, as far as you are concerned, he was on his own if he did issue them?

Chairman THOMAS. Well, Mr. Hawkins, it is——

Chairman HAWKINS. Could you give us a yes or no answer? He certainly did not get such an instruction from you. Now, is that true or not?

Chairman THOMAS. I have attempted to answer that question before. It is much more difficult than he put it, that he is on his own. I support Johnny Butler.

Chairman HAWKINS. Well, I am not asking whether you support him or not. You obviously must support him, at least to the point that you recommended him to become the acting general counsel. But in this specific instance on this particular issue of goals and timetables, did you ever give Mr. Butler any instructions not have the regional attorneys submit litigation recommendations containing goals and timetables?

Chairman THOMAS. Well, let's go back to the enforcement part first. In the existing consent decrees that include goals and timetables, we do monitor those and enforce those that are in existence.

With respect to the first part of it, I can honestly say to you, Mr Hawkins, that I have had vehement discussions with Mr. Butler, generally and specifically, with respect to goals and timetables. His instructions to the field were on his own, based upon his assessment of where the Commission was.

Chairman HAWKINS. Well, did you say anything to him that would give him, by inference, that he should issue such instructions?

Chairman THOMAS. Did I by inference?

Chairman HAWKINS. Yes.

Chairman THOMAS. I think it would be a little bit more. I have very strong views about that, and I am pretty sure I expressed it to him, and he can take it from there, but I did not instruct him to tell the regional——

Chairman HAWKINS. Well, then, he did so on his own accord?

Chairman THOMAS. I think we attempted to explain how Mr. Butler arrived at his decision, how Mr. Butler was aware of my views on this issue when the Commission vote was in favor of the use of goals and timetables.

Chairman HAWKINS. Would you say——

Chairman THOMAS. My views are not new.

Chairman HAWKINS. Would you say the acting general counsel has an obligation to conduct the affairs of his office consistent with the policies of the Commission?

Chairman THOMAS. Yes; how he determines that at times depends upon his assessment of the individual cases that he recommends every day, and he does it in more areas than goals and timetables.

Chairman HAWKINS. Did he do so in this particular instance?

Chairman THOMAS. I think he did.

Chairman HAWKINS. In giving those instructions to the regional attorneys, did he do so in compliance with the Commission's policy on goals and timetables? Was his directive the Commission's position and not his own?

Chairman THOMAS. I think Mr. Butler looked at the votes on the Commission and made a determination. He recommends enough cases to know that. It was not a specific policy that was voted on.

Chairman HAWKINS. So he was reasonable in inferring that that was a policy of the Commission?

Chairman THOMAS. Pardon me?

Chairman HAWKINS. Was it reasonable for him to infer that that was a policy of the Commission?

Chairman THOMAS. I think it was a reason for him to infer that this Commission, if it had an opportunity to vote on goals and timetables in those particular cases——

Chairman HAWKINS. Oh, only in cases where the Commission had an opportunity to vote on?

Chairman THOMAS. Consent decrees, Mr. Hawkins, do not come before the full Commission. We vote on settlements and on Commissioner's charges, decisions, but we do not vote on consent decrees. I think Mr. Butler——

Chairman HAWKINS. Well, he was not carrying out the view possibly of Commissioner Webb, whom I quoted a few minutes ago.

Chairman THOMAS. Commissioner Webb is here. I think he would have to speak for himself.

Chairman HAWKINS. Well, there are different views on the Commission, obviously.

Chairman THOMAS. We have five members, Mr. Hawkins.

Chairman HAWKINS. I take it that the Commission has no policy then and that the acting general counsel has to infer the policy of the Commission on goals and timetables. Hence, he has to try to guess, if they voted, just how they would have voted. Isn't that about the situation?

Chairman THOMAS. Mr. Hawkins, this Commission has never, to my knowledge, or no one has made me aware of a specific Commission vote to include or exclude the use of goals and timetables.

Chairman HAWKINS. Well, that is just what I am saying, that the acting general counsel and all of the other Commission employees——

Chairman THOMAS. In any commission.

Chairman HAWKINS [continuing]. Must infer from what might take place if the Commission voted on such a policy.

Chairman THOMAS. For the past 20 years I assume that would be the case or since 1972.

Chairman HAWKINS. Well, we are talking about the current Commission under your leadership.

Chairman THOMAS. Well, I think that would follow——

Chairman HAWKINS. We are not concerned about what happened 20 years ago.

Chairman THOMAS. My point is simply that there has never been a specific policy, to my knowledge, on the use or inclusion or requirement——

Chairman HAWKINS. Well, maybe there was not any need because there were previous administrations where they believed in them, they upheld them, and they got pretty good results.

Chairman THOMAS. I do not know how anyone can say they got pretty good results when those cases were never monitored.

Chairman HAWKINS. Well, they did a much better job than you are doing.

Chairman THOMAS. That is a matter of opinion.

Chairman HAWKINS. Well, that is my opinion.

Now, in your statement, you speak of the Commission having adopted a policy in December 1983 that calls for fuller investigations than those conducted previously. Well, we certainly agree with that policy.

The committee has learned, however, that charges are being closed prematurely without regard for full investigations based on the merits of the complaints. In addition, the number of cases unresolved at the end of the fiscal year is steadily increasing. Could you tell us how many cases are backlogged at this time?

Chairman THOMAS. In my opinion, we do not have a backlog. We have a running inventory of cases, and that range has ranged from 5 to, I think, maybe as high as 9 or 10 months.

Chairman HAWKINS. How many cases do you have unresolved at the end of fiscal year 1985?

Chairman THOMAS. This is Jim Troy.

Chairman HAWKINS. What is the Commission's backlog of cases?

Mr. TROY. Well, we do not consider it a backlog, Chairman Hawkins. We have 44,918 cases, but with our staff, that is about 11 months of work.

Chairman HAWKINS. You do not consider that a backlog? You obviously do not speak to the same people we speak to. If charging parties filed a complaint with you and it took 6 months or longer to resolve the case, what would you call such a case if you were talking to one of our constituents?

Chairman THOMAS. Mr. Hawkins, there are only a small percentage of our cases that are 300 days old or older. I think that percentage is around 5 percent. We have had it as low as 1 or 2 percent.

Chairman HAWKINS. That is exactly my point. The committee has learned that there was a wholesale closure of cases at the end of fiscal year 1985 at one of your district offices. In addition, investigators at the EEOC are pressured to prematurely close cases which are over 300 days old without a full and thorough investigation.

In light of the above, is the Commission conducting vigorous investigations in the field based upon the complaints that are being filed, and how long does it take the average charge to be processed?

Chairman THOMAS. Let me go back a second. First of all, I do have disagreements with members of this committee on the issue of goals and timetables. We have had no disagreements in the past on the issue of enforcement.

The cases, the manner in which we have attempted to investigate the cases, upgrade our staff, that is a matter of record. We have attempted to come before you before on those particular issues.

I would not suggest to you that we do not have specific instances where we do not meet our targets. We attempt to remedy that through our evaluation systems, et cetera, but my particular views on goals and timetables do not affect the aggressiveness with which we attempt to deal with the cases which come into our office. In fact, that has been our emphasis.

The emphasis in the past has just been on the disposition of the cases, not the investigation of the cases and the remedying of discrimination. There is an important difference, and we have worked very hard to make that stick.

Chairman HAWKINS. Thank you, Chairman Thomas. Chairman Martinez, I am sorry to have taken so much of the committee's time. However, these matters are of paramount importance to the effective enforcement of equal employment opportunity laws.

Mr. MARTINEZ. Thank you, Mr. Chairman.

Mr. Hayes.

Mr. HAYES. Mr. Chairman, thank you.

In the interest of time, I consider it an exercise of futility to raise questions in regards to the use of timetables and goals as a means of eradicating or eliminating discrimination when the head of a commission, buttressed by an attorney and apparently supported by the majority of the members of the Commission have already concluded that timetables and goals are not necessary any longer from what I hear in this testimony. So I do not care to ask any more questions.

Mr. MARTINEZ. All right. Thank you, Mr. Hayes.

In conclusion, Mr. Thomas, I want to go back to your written testimony in which you do indicate that goals and timetables are among the many remedies available for the Commission to seek in employment discrimination cases. You state that as one sentence.

Now, this Commission has not adopted any policy concerning the use of timetables and goals as remedies for discrimination cases under 706, 707 of title VII. On the page preceding that, you do state, though, that there are current cases under litigation in the Supreme Court, and that you will await the Court's ruling on goals and timetables before drawing any further conclusions about their legality.

So I would simply ask in a closing question if the Supreme Court rules in favor of timetables and goals, what will you do?

Chairman THOMAS. Implement them.

Mr. MARTINEZ. Thank you.

We next would like to call the Commissioners themselves for testimony. Your testimonies were submitted and are entered into the record in their entirety.

[The prepared statements of the Commissioners follow:]

PREPARED STATEMENT OF CLARENCE THOMAS, CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Recent reports that the Equal Employment Opportunity Commission has stopped using goals and timetables have prompted inquiries and public speculation from members of Congress and news reporters about the Commission's alleged policy move.

At the outset, let me emphatically point out that the EEOC has not adopted any policy that precludes the use of goals and timetables in settling cases of employment discrimination. Each of us on the Commission, however, has some degree of skepticism about the value of goals and timetables, relative to the value of other available remedies, in providing equal employment opportunities and eradicating discrimination.

Cases containing goals and timetables rarely come before the Commission. Each is considered on a case-by-case basis. We have not considered the use of goals and timetables as an issue in and of itself. Each member of the Commission has a different opinion as to the appropriateness of goals and timetables.

To some degree, I believe that all Commissioners recognize, as courts long have, that numerically based remedies which focus on sex, race or ethnic considerations have the potential to undermine the ultimate goals of nondiscrimination embodied in Title VII.

Beyond that, the improper use of goals and timetables can allow an employer to hide continued discrimination by showing a "good bottom line," can lead to a perception that women and minorities need preferential treatment to compete even after the discrimination has ended and can dilute the relief available to actual victims of discrimination through negotiating trade-offs involving goals and timetables.

The question the Commission has to decide in particular cases is whether these dangers and real costs are worth risking to obtain the identified benefits of goals and timetables. I suspect that each of us will make that calculation in a different fashion in particular situations. I know that each of us will seek to pursue the most effective, and least counterproductive, relief we can develop.

Because there is so much interest in, and there are so many misconceptions about, the Commission's activities pertaining to goals and timetables, I will first attempt to clarify the issue as I see it and then respond specifically to your questions. The members of this Commission and the Acting General Counsel are here and can respond directly to you also.

I am pleased to introduce the members of the Equal Employment Opportunity Commission: Commissioner Tony Gallegos, Commissioner Bill Webb, Commissioner Fred Alvarez and Commissioner Ricky Silberman. The Commission is responsible for making policy and authorizing litigation. We do this by majority vote of the Commission in regularly-scheduled meetings.

In addition, let me introduce Acting General Counsel Johnny Butler. The General Counsel conducts the EEOC's enforcement litigation.

When an individual believes he or she has been discriminated against on the basis of race, color, religion, sex, national origin or age, that individual may come to the EEOC to file a charge under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act or the Equal Pay Act as appropriate. Complaints may be filed on a number of issues, including but not limited to job assignment, promotion, working conditions, wages, hiring, benefits and so forth.

In addition, a Commissioner may file a charge against a respondent in cases where the Commission has reason to believe patterns and practices of discrimination are taking place. Such charges are called Commissioner's charges, and the cases are known as systemic cases.

The depth of the investigation into charges is determined by the complexity of each case. This Commission adopted a policy in December 1983 that calls for fuller investigations than those conducted previously. It is our intention that evidence found in investigations will make solid court cases if discrimination is found and conciliation fails.

When discrimination is found, EEOC attempts to conciliate the charge by negotiating an agreement with the parties. If conciliation fails, the General Counsel presents the case with recommendations on its merits to the Commission. The Commission then votes to litigate or not to litigate each case.

In September 1984, the Commission unanimously adopted a Statement of Enforcement Policy in which it determined that "every case in which the District Director has found that one or more of our statutes has been violated should be submitted to the Commission for litigation consideration if attempts at conciliation fail." Previously, EEOC field offices and the headquarters Office of General Counsel had authority to determine that cases would not be litigated.

In February 1985, the Commission unanimously adopted a Statement of Policy on Remedies and Relief for Individual Cases of Unlawful Discrimination, documenting its commitment to seek the fullest relief possible in every case of discrimination, whether it is sought in court, in conciliation agreements reached before litigation or in federal sector decisions. EEOC now seeks a remedy that requires employers to:

- give charging parties the jobs they would have held but for the discrimination,
- compensate victims for any loss of earnings resulting from discrimination,
- notify all employees of their right to be free of discrimination,
- stop the discriminatory practice immediately, and
- ensure similar violations will not occur again.

Previously the agency emphasized early settlement through "rapid charge processing," which eliminated the agency's tremendous backlog of the time but frequently did not provide satisfactory relief for victims of discrimination.

Often, after the EEOC has filed a complaint in court on behalf of victims of discrimination, the parties settle before trial or before a judgment is rendered. In those cases, a consent decree is issued by the court.

Whether such consent decrees will contain goals and timetables -- when entered into by this Commission -- is the issue of interest here today.

Chairman Martinez, in your letter of February 21, you asked the Commissioners and Johnny Butler to testify on specific questions.

First, you asked for our perception of the legality of the use of goals, timetables and statistical measures in the enforcement of antidiscrimination laws.

Current cases before the Supreme Court [Wygant v. Jackson Board of Education, certiorari granted, April 15, 1985, No. 84-1340; Local 28, Sheet Metal Workers, v. EEOC, certiorari granted, October 7, 1985, No. 84-1656; Firefighters, Local No. 93, v. City of Cleveland, certiorari granted, October 17, 1985, No. 84-1999.] may enlighten this Commission as to the application of goals and timetables. I will await the Court's rulings before drawing any further conclusions about their legality. The Commission legal staff will brief the Commission after the Court rules.

Second, you have asked us to discuss our policies in regard to the use of goals, timetables and statistical measures.

Goals and timetables are among the many remedies available for the Commission to seek in employment discrimination cases. This Commission has not adopted any policy concerning the use of goals and timetables as remedies for discrimination in cases under Section 706 and 707 of Title VII.

Similarly, this Commission has adopted no policy prohibiting the use of statistical measures, either in investigation or in fashioning remedies.

Third, you asked for EEOC's current application of these laws.

It is clear from this Commission's policies, which I have already outlined, that we believe in vigorous enforcement of Title VII, the Age Discrimination in Employment Act and the Equal Pay Act, and that we seek a full remedy in each case.

Fourth, you asked us to testify on EEOC's proposed draft modifications to its current regulations.

The EEOC Affirmative Action Guidelines, found in Title 29 of the Code of Federal Regulations, Part 1608, permit employers or other persons subject to Title VII to voluntarily use goals and timetables. No proposal to modify our current Guidelines exists.

Last, you asked us to direct our attention to recent news accounts of Mr. Butler's order to EEOC regional attorneys not to accept or implement goals and timetables in EEOC suits.

We are responding specifically to the article of February 11, 1986 in The Washington Post. The story reported the Dec. 6 letter which was co-signed by Congressmen Hawkins, Martinez, Frank, Edwards and Congresswoman Schroeder in which I was asked about EEOC's use of goals and timetables. That particular article was the basis for other news accounts that followed.

This Commission has not "abandoned" the use of hiring goals and timetables in race and sex discrimination cases, as the Post reported. The Equal Employment Opportunity Commission has no policy that mandates the use of goals and timetables in cases under Sections 706 and 707 of Title VII. In fact, it is up to the General Counsel, and not the Commission, to conduct litigation. Therefore, in the absence of specific direction from the Commission, it is the General Counsel's decision, not the Commission's, to determine what remedies will be sought in consent decrees.

Our remedies policy clearly states the relief this Commission seeks on behalf of victims of discrimination. While this Commission seeks to make victims whole, we also call for remedies designed to stop and correct any discriminatory practices. Implementation of goals and timetables is a form of prospective relief which offers jobs to future, potential victims of discrimination, but does not solve the problems of individuals who were actually discriminated against and does not provide for the type of practical changes that ensure equal employment opportunities.

This Commission closely monitors compliance with the provisions of each consent decree and conciliation agreement. Consent decrees that existed before I became Chairman were not monitored on a regular basis. However, this Commission honors the provisions of consent decrees entered into by previous Commissions and monitors compliance with them, whether or not they contain goals and timetables.

When employment practices under this Commission's remedies package are monitored by this Commission, the employer may be asked to submit copies of all recruitment advertisements and where they were published, job applications received, records of new hires or other pertinent data so that EEOC may review the actual practices and determine whether the employer is, in fact, offering true equal employment opportunities. Consent decrees containing goals and timetables are monitored by requiring the employer to submit regular reports showing compliance with the numerical goals.

I should point out also that goals and timetables are unworkable in much of our current litigation caseload -- for example, cases involving age discrimination, compensation or pregnancy benefits.

During the last week of October 1985, EEOC's Regional Attorneys attended a meeting in Baltimore. During that meeting, Acting General Counsel Johnny Butler advised the attorneys not to seek goals and timetables in new consent decrees, and told them he would review all new consent decrees before they were filed with the court.

Mr. Butler's statement was made pursuant to his authority to conduct litigation on behalf of the Commission and his interpretation of the general direction of Commission policy.

As Representative Barney Frank stated at the Commission's June 21, 1985 hearing before the Employment and Housing Subcommittee of the House Committee on Government Operations, "We have learned more about new and more subtle forms of discrimination, and people believe it is time to take a next step and further sophisticate our weapons against discrimination."

With discriminators becoming sophisticated, we who enforce the laws against employment discrimination must also become sophisticated. Goals and timetables were offered as an answer to discrimination in the past. We need to critically reappraise our undue reliance upon them. Our approach must be much more innovative, far-reaching and thorough.

Sole reliance upon goals and timetables carries with it one very clear, inherent danger -- that employers can hide behind the numbers of minority individuals they employ, without ever truly providing equal opportunities for those individuals to be hired and rise through the ranks on their own merits.

As long as minorities and women are treated as numbers, and not as individuals with unique combinations of education, experience and training to offer employers, they will not be able to reach their full potential in the professional world, and will not share fully in our national economy.

The legislators who enacted the Civil Rights Act of 1964 wisely provided for a five-member Commission to be responsible for enforcing the laws against employment discrimination. No two of us on this Commission think identically on all issues. We do agree on one thing, though: all of us here today are dedicated to eradicating employment discrimination.

We approach our policies as a collegial body, discussing and considering all possible approaches to meeting employment discrimination challenges. As a result, we have been able to unanimously adopt significant enforcement policies that work. This Commission's policies are geared to address discrimination in all its forms, old and new. We are getting positive results.

Our charges are better investigated, litigation activity has increased and monetary benefits for victims through litigation are being recovered in record-breaking amounts.

For the Equal Employment Opportunity Commission to keep pace with discrimination and effectively enforce the laws, we must be encouraged -- not discouraged -- in our efforts to prepare for and deal with a more sophisticated and subtle form of discrimination. What we're doing works.

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PREPARED STATEMENT OF FRED W. ALVAREZ, COMMISSIONER, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

I. INTRODUCTION

I welcome this opportunity to respond to the inquiries contained in your communication of February 21, 1986 noticing the Members of the Equal Employment Opportunity Commission of this hearing. That correspondence requested that I discuss my individual perceptions about five specific issues: (1) the legality of the use of goals, timetables and statistical measures in enforcement of anti-discrimination laws, (2) EEOC's policies in regard to the use of goals, timetables and statistical measures, (3) the EEOC's current application of these laws, (4) the status of any proposed draft modifications to current regulations, and (5) recent news accounts of the General Counsel's order to Regional Attorneys not to accept or implement goals or timetables in EEOC suits.

In my view, a useful discussion of these issues can only be accomplished within the context of this Commission's articulated ambitions for effective law enforcement and its commitment to effective remedies. In July of last year, I testified before this Committee regarding the Commission's evolving law enforcement program including the Commission's Statement of Remedies and Relief for Individual Cases of Unlawful Discrimination ("Remedies Policy for Individual Cases").

The Remedies Policy for Individual Cases addresses specifically the Commission's remedial approach to individual cases of discrimination. As the Commissioners indicated to you in correspondence dated April 23, 1985, the Policy commits the Commission to seeking full and effective relief for every victim of unlawful discrimination, through individual and class actions, as appropriate. In addition to full victim relief, the policy requires, by its own terms, that the Commission remedy the illegal discrimination found in the course of the investigation of the individual or class case.

The language contained in that Policy Statement sets out conceptual parameters for the Commission's general approach to remedies and relief:

> Henceforth, in negotiating settlements, in drafting prayers for relief in litigation pleadings or in issuing Commission Decisions or Orders, obtaining full remedial, corrective and preventive relief is the standard by which the Agency is to be guided.

The Statement further provides:

> The remedy must be fashioned from the wide range of remedial measures available to this law enforcement agency which has broad authority under the statutes it enforces to seek appropriate forms of legal and equitable relief. The remedy must also be tailored, where possible, to cure the specific situation which gave rise to the violation of the statute involved.

The Commission's Statement enumerated five general elements which its law enforcement personnel should consider in crafting relief. Two of those elements are clearly designed to provide complete relief to each victim of the illegal discrimination at issue. The other three elements are a recognition of the Commission's law enforcement obligation to prevent further discrimination and to ensure that the respondent cease from engaging in the specific unlawful employment practice at issue. It also provides that the Commission will ensure that employees are notified of their rights and reassured that they will be free of such discrimination in the future.

Thus the Commission has already spoken in terms that are applicable to our discussion. The issue you raise today is whether the Commission will continue to use goals, timetables or other statistical measures as remedial devices in Commission efforts to dismantle patterns and practices of discrimination established by particular employers. I hope that we will. Certainly, the Remedies Policy for Individual Cases demonstrates that this Commission is committed and willing to explore the boundaries of our law enforcement statutes in a search for effective remedies. It has put the Equal Employment Opportunity Commission's constituents on notice that the Commission does not intend to be timid in the pursuit of these effective remedies.

I respectfully disagree, however, with the view that statistically based race, sex or ethnic conscious remedies are "the most effective tool" available to remedy discrimination. I do not think goals should be used by themselves or merely to manipulate the composition of a workforce. Such a use of goals does nothing to further the fundamental remedial purpose of changing an employer's discriminatory employment practices. However, in my view, these remedial techniques can be effective only if used in conjunction with other actual remedies such as make-whole relief, policy change and barrier elimination in order to closely monitor the employment process found to have caused the discrimination.

As you will note in my specific responses to your inquiries, I am secure in the availability of statistical goals or analyses as part of the Commission's law enforcement efforts. Whether there is complete agreement with my individual conclusion in this matter, the Commission's ongoing discussions regarding the effectiveness of particular curative and corrective strategies designed to prevent recurrence of illegal discrimination are not only legitimate but essential to the strong law enforcement commitments made by this Commission.

Finally, I am concerned that a public debate which has so narrowly focussed on goals and timetables for such a prolonged time may be misleading the basic constituencies served by Title VII and the other anti-discrimination laws enforced by the Commission.

Victims or potential victims of discrimination should not conclude from this debate that the Commission is less than fully committed to investigating and remedying any employment discrimination they have suffered. Employers, unions and employment agencies should not conclude from this debate that this Commission is other than fully committed to detecting patterns and practices of discrimination and seeking relief designed to correct and cure that discrimination and prevent its recurrence. The public focus on the important debate about the propriety of statistically based, race, sex and ethnic conscious relief in pattern and practice cases should not obfuscate the fundamental law enforcement mission to which this Commission has so vigorously and unanimously committed itself.

The remainder of my testimony will be organized to respond to the specific questions raised by the Subcommittee in its February 21, 1986, letter.

II. MY INDIVIDUAL PERCEPTION OF THE LEGALITY OF THE USE OF GOALS, TIMETABLES AND STATISTICAL MEASURES

I have reviewed the case law, both before and after the Supreme Court decision in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984). On the basis of that analysis, which I set forth below, I conclude that properly crafted goals, timetables and statistical measures are legally available remedial techniques which may be used in appropriate pattern and practice cases. However, the case law makes clear that statistically based, race, sex or ethnic conscious relief is a remedy that has the potential, if used carelessly to undermine the ultimate goal of nondiscrimination embodied in Title VII. For this reason, I believe that such statistically based goals should be used with extreme caution and only as part of a remedial package which is carefully designed to correct and prevent the unlawful discrimination uncovered by our investigation.

A. Pre-Stotts Case Law

The use of statistically based, race, sex or ethnic conscious goals to correct egregious patterns of discrimination has been a well-established remedial technique made available by the courts since the late 1960's. Every court of appeals to address the issue has held that such goals are a legally available remedy under Title VII. See, e.g., McKenzie v. Sawyer, 684 F.2d 62, 79-80 (D.C. Cir. 1982); Association Against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256, 279 (2nd Cir. 1981), cert. denied, 455 U.S. 988 (1982); Chisholm v. United States Postal Service, 665 F.2d 482, 498-99 (4th Cir. 1981); Phillips v. Joint Legislative Committee, 637 F.2d 1014, 1026 (5th Cir. 1981), cert. denied, 456 U.S. 960 (1982); United States v. City of Chicago, 549 F.2d 415, 436-437 (7th Cir.), cert. denied 434 U.S. 875 (1977); United States v. Elevator Constructors, Local 5, 538 F.2d 1012, 1018-20 (3rd Cir. 1976); Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622, 631-632 (2nd Cir. 1974); Boston Chapter NAACP, Inc. v.

Beecher. 504 F.2d 1017. 1026-28 (1st Cir. 1974). cert. denied. 421 U.S. 910 (1975); United States v. Local Union No. 212, IBEW, 472 F.2d 634 (6th Cir. 1973); Carter v. Gallagher. 452 F.2d 327. 329-30 (8th Cir.). cert. denied, 406 U.S. 950 (1972); United States v. Ironworkers Local No. 86, 443 F.2d 544, 553 (9th Cir.), cert. denied. 404 U.S. 984 (1971).

This uniform body of case law is based upon the broad remedial authority made available to federal courts under Title VII. Section 706(g) of Title VII empowers federal courts to:

> . . . enjoin the respondent from engaging in such unlawful employment practice. and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

42 U.S.C. §2000e-5(g) (1976) (emphasis added). This provision has consistently been interpreted as providing courts with "broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of [Title VII] eliminate their discriminatory practices and the effects therefrom." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 361 n.47 (1977). See also. Local 53, Heat and Frost Insulators v. Vogler, 407 F.2d 1047. 1052-53 (5th Cir. 1969); United States v. City of Chicago. 549 F.2d at 436.

In the unanimous view of the circuit courts, the establishment of numerical employment objectives can be an appropriate means to assist in the dismantling of an egregious and entrenched pattern and practice of discrimination. Courts have found that goals may contribute to pattern and practice relief by assisting in the process of monitoring future nondiscriminatory practices, by helping to eliminate barriers to equal employment opportunity, and, in certain circumstances, by simply increasing the participation of previously excluded groups in the employer's work force. See Thompson v. Sawyer, 678 F.2d 257, 294-295 (D.C. Cir. 1982) (goals provide necessary incentive to make "a dilatory or obstructive employer" offer employment opportunities on a "genuinely nondiscriminatory basis"); United States v. City of Alexandria, 614 F.2d 1358, 1366 (5th Cir. 1980) (race-conscious goals help counteract hidden forces in the employer's selection system that had tended to favor qualified whites over other qualified candidates); NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974) (goals help to remove the "outward and visible signs of yesterday's racial distinctions"); and Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971) (goals counteract the effects of past discrimination by providing positive assurance to minority members that, if qualified, they will be hired on more than a token basis).

While uniformly endorsing the legal availability of race, sex or ethnic conscious relief, courts have always recognized the inherent dangers in the use of these remedies and exercised great caution before ordering the implementation of such techniques in particular cases. United States v. City of Chicago, 549 F.2d at 437. Such goals are only appropriate where there has been "a clear-cut pattern of long-continued and egregious" discrimination. Kirkland v. New York State Department of Correctional Services, 520 F.2d 420, 427 (2nd Cir. 1975), cert. denied, 429 U.S. 823 (1976). Even then, goals must of limited duration and carefully tailored to remedy the discrimination found. As the D.C. Circuit has cautioned:

> [Goals] should be as limited as needed to end discrimination effectively, targeted at the specific discrimination to be eradicated, as consistent as possible with the legitimate concerns of others, and if possible supplanted by other forms of relief . . . .

McKenzie v. Sawyer, 684 F.2d at 80. Thus, goals are not "ordinary" remedies which are presumptively appropriate in all Title VII cases. Rather, they are to be used in the exceptional case when other remedial techniques would not be sufficient to remedy long-standing patterns of discrimination. The appropriateness of such a remedy must be judged on a case-by-case basis. Association Against Discrimination v. City of Bridgeport, 647 F.2d at 281; Thompson v. Sawyer, supra (reversing particular use of goals as inappropriate).

B. Analysis of Stotts Decision

In Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984), the Supreme Court reviewed one particular use of race-conscious relief and concluded that the remedy in that case was not within the bounds available under Title VII. This decision has naturally raised serious questions about the legal availability of other race-conscious relief. The Supreme Court is expected to provide further guidance on this issue later this term. Until such guidance is forthcoming, however, my own conclusion is that Stotts does not invalidate the use of prospective goals where they do not amount to the award of make-whole relief to specific individuals who are not shown to be victims of discrimination.

In Stotts, the Supreme Court held that a district court lacks authority to issue an order which deprives white employees of their accrued seniority and causes them to be laid off in order to retain certain black employees who had been hired pursuant to a prior affirmative action order but who had not been shown to be victims of past discrimination. The Court based this holding on both §703(h) which protects "bona fide seniority systems" and §706(g) which defines the types of relief available under Title VII. In discussing §706(g), the Court held that make-whole relief under that section must be limited to actual victims of the employer's past discrimination.

The Court's holding concerning §706(g) has been argued by some to stand for the proposition that a court may not order the use of race-conscious goals or timetables which are not narrowly confined so as to benefit only identified victims of discrimination. I believe that this is an overbroad reading of Stotts. On the other hand, others have argued that the Stotts holding concerning §706(g) applies only to court-imposed requirements that seniority be ignored in conducting layoffs. I believe that this very narrow reading of Stotts is also erroneous. In my view, while Stotts does not proscribe all use of goals, it does set limits applicable to their use in all employment contexts.

The fundamental error behind the overbroad interpretation of Stotts is that it reads the opinion to say that all relief under Title VII must be limited to identifiable victims of the employer's discrimination. The Court, on the other hand, carefully applies this restriction only to "make-whole" relief. This distinction is very significant because the Court has always held that there are two types of relief which may be ordered following a finding of a pattern or practice of discrimination: "prospective" relief designed to assure that employers "eliminate their discrminatory practices and the effects therefrom"; and "retroactive" relief designed to make whole individual victims of the employer's discrimination. International Brotherhood of Teamsters v. U.S., 431 U.S. at 361-371. Prospective relief may be awarded as soon as there is a finding of discrimination. Id. at 361. The award of retroactive, make-whole relief for victims, however, requires additional proceedings to identify which individuals have been harmed by the employer's discriminatory practices. Id. at 361-371.

In Stotts, the Court reaffirmed the need to identify individual victims of discrimination before awarding make-whole relief. The Court did not suggest that prospective, curative relief was no longer available. Moreover, the Court did not state that such prospective relief had to be designed so that it would only "benefit" individual victims of discrimination. In fact, imposing a "victim specific" limitation on prospective relief would not make sense. The intent behind any prospective relief (whether it be a general injunction not to discriminate or a more specific curative order) is to change an employer's discriminatory practices for the future. The "beneficiaries" of such injunctive relief necessarily include applicants and employees who were not the victims of the employer's past unlawful conduct. Thus, in a basic sense, injunctive relief always "benefits" nonvictims to the extent that the relief cures the general effects of past discrimination and prevents or discourages future discrimination.

The difficult question after Stotts is to determine what is "make-whole" relief and what is "prospective" relief designed to reform an employer's discriminatory practices. Stotts teaches us that we cannot merely look to labels. The district court in Stotts did not say it was granting retroactive, make-whole seniority to individuals who had not proven their victim status. It characterized its relief as a general injunctive measure to preserve previous affirmative action gains. Nonetheless, the Court held that the district court order, in effect, gave retroactive seniority to specific minority individuals and required the discharge of other specific individuals who had greater accrued seniority rights. Because this relief amounted to an award of make-whole relief to specific nonvictims, the Court held that such relief was outside the scope of §706(g). The determining factor which converts a prospective injunction into impermissible make-whole relief is whether an individual is deprived of accrued employment rights in order to make room for another individual who has not been victimized by discrimination. Such displacement of an individual with a matured entitlement to employment can only be justified where it has a true make-whole purpose in that it is necessary to restore an aggrieved individual to the individual's rightful place in the work force. See Stotts, 104 S. Ct. at 2587 n.9 ("Title VII precludes a district court from displacing a non-minority employee with seniority under the contractually established seniority system absent . . . a determination that such a remedy was necessary to make whole a proven victim of discrimination . . . ."); see also EEOC Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination (February 5, 1985).

In my opinion, Stotts now requires careful and realistic analysis of affirmative relief orders to determine whether they are geniunely prospective. I see nothing in the opinion which suggests that all use of goals and timetables is unlawful under §706(g). In fact, the opinion indicates a contrary conclusion. First of all, the Court obviously was aware that every court of appeals had approved the use of prospective hiring and promotion goals without regard to whether those benefitted were victims of discrimination. Yet the Court in no way implied that it was overruling these well-established precedents. Secondly, while noting that the original decree in the Stotts case involved hiring and promotion goals, the Court did not even suggest that this relief was unlawful under its view of §706(g).

The fact that the Stotts decision did not disturb the consistent body of circuit law is significant. The courts of appeals have traditionally treated race-conscious goals as a prospective form of relief which may be entered following a finding of a pattern or practice of discrimination without additional proceedings to identify specific victims of the discrimination. This is because goals are not designed to give relief to any specific individuals but rather to change an employer's prior exclusionary practices. A goal does not require an employer to hire any particular person. Rather, it serves as an indicator of whether an employer has actually changed its discriminatory employment patterns and practices so that it is no longer excluding people from its work force because of race, sex or national origin. The Supreme Court in Teamsters noted that the prospective injunction entered in that case involved numerical goals. 431 U.S. at 330 n.4, 361 n. 47. While the Court required meticulous identification of the individuals entitled to receive make-whole retroactive seniority, it did not indicate any inconsistency between that requirement and the lower court's more general use of a goal to remedy the employer's practices.

I therefore do not read *Stotts* as barring properly-crafted numerical goals as a remedial device under Title VII. Every court of appeals to consider the issue since *Stotts* has similarly concluded that *Stotts* did not invalidate hiring and promotion goals contained in court orders and consent decrees. *Commonwealth of Pennsylvania v. Local Union No 542* 770 F.2d 1068, 38 FEP Cases 673 (3rd Cir. 1985), *cert. denied*, 54 U.S.L.W. 3461 (U.S. Jan. 14, 1986) (No. 85-828); *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985); *Deveraux v. Geary*, 765 F.2d 268 (1st Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3229 (U.S. Sept. 19, 1985) (No. 85-492); *Turner v. Orr*, 759 F.2d 817 (11th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3086 (U.S. July 31, 1985)(No. 85-177); *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3223 (U.S. Oct. 8, 1985) (No.84-1999); *EEOC v. Local 638*, 753 F.2d 1172 (2nd Cir. 1984), *cert. granted*, 54 U.S.L.W. 3223 (U.S. Oct. 8, 1985)(No. 84-1656). *See also*, *Diaz v. American Telephone and Telegraph*, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985); *Van Aken v. Young*, 750 F.2d 43 (6th Cir. 1984)(*Stotts* limited to situations where employees are deprived of vested rights); *Grann v. City of Madison*, 738 F.2d 786, 795 n.5 (7th Cir.), *cert. denied* 105 S. Ct. 296 (1984)(same). Rather, I view *Stotts* as requiring a more searching and precise look at the goals that are used in order to determine whether the effect of the goals is to grant make-whole relief to specific individuals who were not victims of discrimination while at the same time depriving other individuals of accrued employment rights. In my opinion, goals which have these latter effects are inconsistent "with the policy behind §706(g) of Title VII." Stotts, 104 S. Ct. at 2588.

On the other hand, unlike some who have taken a very "narrow" view of Stotts, I do not see a legal basis for restricting the opinion to layoffs. The standards enunciated in Stotts clearly apply to all remedial actions covered by §706(g): hiring, reinstatement and promotion. Thus, there may be some hiring and promotion goals previously used which are not permissible following Stotts. For example, if state civil service laws establish an entitlement to be promoted based on the results of a valid test, a court order that required the employer to select minority candidates who had not been victims of discrimination out of order of test scores might overstep the bounds of a permissible prospective order and, in effect, constitute the award of "make-whole" type relief to nonvictims. As in Stotts, such an order would require the selection of specific minority candidates and deny specific nonminority candidates of accrued rights.

Any reading of Stotts which invalidates all use of race-conscious goals and timetables as remedies for Title VII violations would render Stotts fundamentally inconsistent with the rationale in United Steelworkers of America v. Weber, 443 U.S. 193 (1979). Although Weber dealt with voluntary affirmative action plans, it endorsed the view that prospective forms of race-conscious relief may be a lawful and appropriate means of eradicating the effects of prior discrimination. If such prospective forms of relief are appropriate for an employer to use voluntarily to reform its conduct, certainly a court, after finding an egregious and chronic pattern or practice of discrimination, could use similar techniques to remedy the violation of federal law. Moreover, it would be anomalous to permit employers, voluntarily and without supervision, to use a potentially harmful remedy for suspected Title VII violations, while denying courts the right to use the same remedial technique for proven acts of discrimination under carefully controlled circumstances. My reading of Stotts, on the other hand, harmonizes the Stotts opinion with Weber. Under my reading, the Stotts decision recognizes that a court's broad remedial power under §706(g) includes the authority to use goals and timetables provided they are confined within appropriate limits. Therefore, Stotts restricts the forms of affirmative relief recognized in Weber by engrafting the statutory limitations of §706(g) onto the general Weber requirement that race-conscious relief not "unnecessarily trammel" the interests of white employees. Weber, 443 U.S. at 208.

This reading of Stotts is also in harmony with the Supreme Court's rulings under the Fourteenth Amendment which recognize that race-conscious actions may be lawful where they are part of a carefully confined program to remedy the effects of past discrimination. Fullilove v. Klutznick, 448 U.S. 448, 482-483 (1980) (Opinion of Burger, C.J.); Regents of University of California v. Bakke, 438 U.S. 265, 300-302, 351-355 (1978) (Opinions of Powell and Brennan);

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). In fact, in the context of school desegregation, Chief Justice Burger has cautioned that some use of race-conscious numerical ratios may be a necessary starting point in fashioning adequate relief for prior discrimination:

> Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. . . . [S]ome ratios are likely to be useful starting points in shaping a remedy. An absolute prohibition against use of such a device - even as a starting point - contravenes the implicit command of Green v. County School Board, 391 U.S. 430 (1968), that all reasonable methods be available to formulate an effective remedy.

Board of Education v. Swann, 402 U.S. 43, 46 (1971).

Based on the foregoing analysis, I believe that the Stotts decision does not preclude the use of properly designed and justified race-conscious goals and timetables as part of the remedy for violations of Title VII. However, I believe that Stotts does require that such remedial techniques be carefully tailored by the courts so that they do not deprive some individuals of accrued employment rights, and thus amount to the award of "make-whole" relief to other individuals who have not been victimized by discrimination.

III. EEOC'S POLICIES IN REGARD TO THE USE OF GOALS, TIMETABLES AND STATISTICAL MEASURES

The issue of the appropriateness of goals, timetables and statistical measures may arise in two distinct contexts: (1) whether such techniques may be used on a voluntary basis by employers in implementing affirmative action plans; and (2) whether such techniques are a lawful or effective method of remedying a demonstrated pattern of discrimination, which may be used in court decrees or conciliation agreements.

With regard to the first issue, the Commission adopted Guidelines in 1979 which describe the circumstances in which voluntary affirmative action is appropriate and establish standards for developing voluntary affirmative action plans which do not violate Title VII of the Civil Rights Act. *See* 29 C.F.R. Part 1608. These Guidelines permit employers to use reasonable goals and timetables in appropriate circumstances. The Commission has not altered or proposed to alter these Guidelines.

As regards remedial relief in pattern and practice cases, the Commission does not have any published Guidelines which address appropriate forms of relief in general or the availability of goals and timetables in particular. Nonetheless, Commission lawyers and investigators have obtained goals, timetables and other statistical remedies in a number of cases in the past. The

Commission has taken no steps to modify or renegotiate such existing court decrees or conciliation agreements. Nor has the Commission voted either to affirm or to change the Commission's past practice with regard to goals and timetables.

IV. EEOC'S CURRENT APPLICATION OF GOALS TIMETABLES AND STATISTICAL MEASURES

A. Commission's Case-By-Case Approach

The Commission addresses the question of appropriate relief for pattern and practice cases whenever that issue is raised in a particular case which comes before the Commission. This might occur when the Commission is authorizing litigation alleging a pattern of discrimination, or when the Commission is reviewing a proposed conciliation agreement resolving a Commissioner's charge of systemic discrimination.

In reviewing a particular case, the Commission's aim is to fashion an effective and complete remedy for the violation of federal law which we have uncovered. Such relief must include "corrective, curative or preventive action designed to ensure that similar violations of the law will not recur." Cf. EEOC's Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination. The Commission has begun a dialogue concerning whether numerical goals or other statistical measures are an effective part of the remedy in a pattern and practice case. To date, no consensus has been reached by the Commission on the issue.

B. My Views on the Proper Application of Goals, Timetables and Statistical Measures

In my view, the Commission can make a valuable contribution to the public debate on the efficacy of goals and other statistical techniques for remedying employment discrimination. The use of goals has developed on an *ad hoc* basis as courts have tried to fashion some kind of remedy to achieve meaningful compliance with Title VII by employers who have shown an entrenched resistance to equal employment opportunity. Goals have been computed in many different ways to accomplish very different objectives. Frequently, the precise purpose to be achieved by use of a particular statistical goal has not been clearly articulated.

I am hopeful that the Commission's discussions will help to clarify how statistics can be used as part of an effective remedy for discrimination. In order to do this, it is necessary for us to first define the remedial aims in a pattern and practice case, and then evaluate what uses of statistics contribute to, and which detract from, these aims.

I believe that the fundamental aim in any pattern and practice decree should be to transform an employer that has been practicing discrimination into an employer that accords full and meaningful equal employment opportunity to all individuals. In order to achieve this aim, it is necessary to provide make-whole relief that restores all victims of discrimination to the place they would have occupied but for the discrimination, to diagnose and change those aspects of the employer's practices which have contributed to the discrimination, and to provide effective monitoring mechanisms to ensure that a nondiscriminatory employment process is now in place.

In my view, goals and statistical devices can be used most effectively as one part of the monitoring process in a pattern or practice decree. Just as we may use statistics to help determine the existence of a Title VII violation, we may use statistics to help determine whether that discrimination has ended. Similarly, establishing reasonable objectives for an employer who has been practicing discrimination helps to ensure that the employer will give serious consideration to applicants from excluded groups and employ those individuals on more than a token basis.

Because of my view that statistics should be used primarily as a monitoring device, I think that much care must be taken to set any numerical goals at an appropriate level. Goals should not be set at a level to achieve a preconceived notion of racial, sexual or ethnic balance. Rather, they should be set at a point which helps to assure that, based on sound statistical theory, it is unlikely that discrimination is continuing.

Finally, because I view goals as a measuring device and compliance tool, I think it is important, as a general matter, to avoid use of goals which accord preferential treatment to members of a previously excluded group. Although there may be rare contexts where this is necessary to achieve a valid remedial purpose, such techniques tend to undermine rather than further the goals of Title VII. Requiring an employer to accord preferential treatment does not help to teach that employer to accord equal opportunity without regard to race, sex or national origin. Moreover, such techniques, which are often perceived as unfair, may exacerbate rather than improve relationships between groups.

Thus in my view, goals and other statistical measures should be one feature of a comprehensive remedial package that includes the following basic parts:

(1) Make Whole: The remedial package should provide for make whole relief for the identified victims of discrimination.

(2) Diagnosis and Change: The remedial package should contain an analysis and diagnosis of those aspects of the respondent's employment practices and policies which have contributed to the pattern and practice of discrimination and a plan for correcting and changing those practices;

(3) Process Monitoring: The remedial package should provide for an appropriate vehicle for monitoring, on a random or actual basis, the employment process at issue; and

(4) Monitoring Goals: The remedial package should provide for a statistical monitoring mechanism which would provide an indicator of the effectiveness of the diagnosis of discrimination and the solutions and changes made as a result of the diagnosis. These statistical monitors would be set at a statistical level which would indicate that a nondiscriminatory hiring process is probably occuring.

V. STATUS OF ANY PROPOSED DRAFT MODIFICATIONS TO EEOC'S CURRENT REGULATIONS

I am not aware of any proposed modification of a regulation with respect to goals, timetables or other statistical measures.

VI. RECENT NEWS ACCOUNT OF THE GENERAL COUNSEL'S ORDER TO THE REGIONAL ATTORNEYS NOT TO ACCEPT OR IMPLEMENT GOALS AND TIMETABLES IN EEOC SUITS

I am aware that the Acting General Counsel, Johnny Butler, informed the agency's Regional Attorneys that he will no longer approve new settlements of litigation which contain goals or timetables. I understand that this action is based on the Acting General Counsel's perception that such remedies are not acceptable to a majority of the Commission.

It is the General Counsel's responsibility to accept or reject settlement proposals once a case is in litigation, unless the Commission expresses a particular view with respect to relief. I agree with Mr. Butler that, so far as possible, these judgments should be made in a manner which is consistent with the expressed will of the Commission. Although, the Commission has not yet developed a consensus position on the appropriate use of goals, Mr. Butler senses a reluctance on the part of the Commission to use such techniques. I appreciate that the General Counsel must continue to run our litigation program and must give interim guidance to his staff based on his best prediction of what will ultimately prove to be the Commission's position. Nonetheless, while I understand the General Counsel's action, I disagree with his assessment of the direction of the Commission's thinking on this issue. The Commission will continue its current dialogue on pattern and practice remedies and the usefulness of statistical measures in securing complete curative, corrective and preventive relief. Until those discussions have concluded, it is premature to predict what remedial tools the Commission will chose to retain in its arsenal of potential remedies for pattern and practice cases.

Prepared Statement of Tony E. Gallegos, Commissioner, Equal Employment Opportunity Commission

GOOD MORNING, MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE.

YOU HAVE CALLED THE MEMBERS OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ("EEOC") TO APPEAR BEFORE YOU SO THAT WE PRESENT, INDIVIDUALLY AND COLLECTIVELY, OUR VIEWS ON, AMONG OTHER THINGS, THE USE OF GOALS AND TIMETABLES IN TITLE VII ENFORCEMENT. YOUR CALLING US BEFORE YOU TODAY WAS PROMPTED BY RECENT REPORTS THAT THE EEOC HAS, AS A POLICY MATTER, ARBITRARILY STOPPED USING GOALS AND TIMETABLES AS A REMEDY UNDER TITLE VII. FIRST AND FOREMOST, I DO WANT TO MAKE ONE THING ABSOLUTELY CLEAR: THE COMMISSION HAS NOT ADOPTED ANY POLICY WHICH DEVIATES FROM EXISTING POLICY, DIRECTIVES AND GUIDANCE REGARDING THE USE OF GOALS AND TIMETABLES AS A REMEDY IN ENFORCEMENT OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED.

THIS IS NOT TO SAY, HOWEVER, THAT THERE ARE NOT DIFFERENCES IN OPINION REGARDING THEIR USE. THERE ARE FIVE COMMISSIONERS AT THE EEOC AND I WOULD BE HARD PRESSED TO STATE THAT ANY TWO OF US AGREE ON WHEN, HOW AND UNDER WHAT CIRCUMSTANCES TO USE GOALS AND TIMETABLES. I DO, HOWEVER, WANT TO MAKE IT CLEAR THAT ALL FIVE MEMBERS OF THIS COMMISSION BELIEVE IN EFFECTIVE AND VIGOROUS ENFORCEMENT OF ALL THE LAWS OVER WHICH THE EEOC HAS RESPONSIBILITY. HAVING SAID THIS, I NEXT ADDRESS MY INDIVIDUAL PERCEPTIONS REGARDING THE USE OF GOALS AND TIMETABLES, WHICH IS THE BASIC SUBJECT OF YOUR INQUIRY.

IN MY OPINION GOALS AND TIMETABLES ARE BUT ONE OF THE MANY EFFECTIVE REMEDIES AVAILABLE UNDER TITLE VII, AND I BELIEVE IN THEIR USE.

AS STRONGLY AS I BELIEVE IN THE USE OF THIS REMEDIAL METHOD FOR ERADICATING DISCRIMINATION, I AM EQUALLY SKEPTICAL OF ITS EFFECTIVENESS FOR CERTAIN PROTECTED GROUPS, IN PARTICULAR HISPANICS AND AMERICAN INDIANS. YOU CAN APPRECIATE MY SKEPTICISM WHEN YOU CONSIDER WHAT HAS HISTORICALLY HAPPENED AT THE

COMMISSION. I HAVE NOT SEEN ANY MAJOR IMPACT LITIGATION BROUGHT ON BEHALF OF HISPANICS OR AMERICAN INDIANS STANDING ALONE. THE TYPES OF SYSTEMIC CASES THAT I HAVE SEEN ARE THOSE INVOLVING COMBINED ALLEGATIONS OF RACE, SEX AND NATIONAL ORIGIN DISCRIMINATION. TRUE, SUCH ACROSS THE BOARD CASES SHOW THAT THE COMMISSION DOES LITIGATE ON BEHALF OF ALL THE PROTECTED GROUPS. BUT WHAT I ALSO SEE IS THE USE OF THE TERM "MINORITIES" IN CONCILIATION AGREEMENTS AND CONSENT DECREES. THE EFFECT OF SUCH AGGREGATION OF THE RACIAL AND ETHNIC GROUPS UNDER THE TERM "MINORITIES" ALLOWS THE EMPLOYER TO COMPLY WITH THE PROVISIONS OF THE CONCILIATION AGREEMENT OR CONSENT DECREE FOR ALL PROTECTED GROUPS WITHOUT BEING ACCOUNTABLE FOR IMPROVING THE EMPLOYMENT OPPORTUNITIES OF SPECIFIC PROTECTED GROUPS COVERED BY THE AGREEMENT OR DECREE. GOALS AND TIMETABLES CAN BE AN EFFECTIVE REMEDIAL TOOL, BUT THEY HAVE TO BE TAILORED TO EACH OF THE PROTECTED GROUPS COVERED BY THE CONSENT DECREE, NOT ESTABLISHED AS AN AGGREGATION OF PROTECTED GROUPS.

THE BASIC CONTROVERSY REGARDING GOALS AND TIMETABLES IS COMPARING THAT WHICH THE STATUTE EXPLICITLY PROVIDES WITH THAT WHICH IS AVAILABLE TO THE COURTS AND TO THE COMMISSION AS A PROSPECTIVE REMEDY TO ADDRESS EMPLOYMENT DISCRIMINATION.

IT MUST BE RECOGNIZED THAT THERE IS WELL-ESTABLISHED CASE LAW WHICH STATES THAT TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, IS A CIVIL RIGHTS STATUTE REMEDIAL IN NATURE AND AS SUCH MUST BE LIBERALLY CONSTRUED. THE FEDERAL COURTS HAVE RECOGNIZED THIS UNDERLYING PREMISE SINCE THE INCEPTION OF TITLE VII. HOWEVER, WE MUST ALSO RECOGNIZE THAT THERE ARE LIMITS TO THIS LIBERAL CONSTRUCTION OF THE STATUTE. BE THAT AS IT MAY, TO ME, THE STATUTE IS QUITE CLEAR ON THE AVAILABILITY OF GOALS AND TIMETABLES AS A REMEDY. SECTION 706(G) OF TITLE VII EXPRESSLY PROVIDES:

> IF THE COURT FINDS THAT RESPONDENT HAS INTENTIONALLY ENGAGED IN OR IS INTENTIONALLY ENGAGING IN AN UNLAWFUL EMPLOYMENT PRACTICE CHARGED IN THE COMPLAINT, THE COURT MAY ENJOIN THE RESPONDENT FROM ENGAGING IN SUCH UNLAWFUL EMPLOYMENT PRACTICE, AND ORDER SUCH AFFIRMATIVE ACTION AS MAY BE APPROPRIATE, WHICH MAY INCLUDE, BUT IS NOT LIMITED TO, REINSTATEMENT OR HIRING OF EMPLOYEES, WITH OR WITHOUT BACK PAY, . . . OR ANY OTHER EQUITABLE RELIEF AS THE COURT DEEMS APPROPRIATE. (EMPHASIS ADDED).
>
> (42 U.S.C. §2000E-5(G).

THIS SECTION OF THE STATUTE THUS PROVIDES THE UNDERLYING FOUNDATION IN DEFENSE OF GOALS AND TIMETABLES AS AN APPROPRIATE REMEDY. IT CLEARLY AND UNEQUIVOCALLY STATES THAT A COURT MAY ORDER "SUCH AFFIRMATIVE ACTION AS MAY BE APPROPRIATE, WHICH MAY INCLUDE BUT IS NOT LIMITED TO, REINSTATEMENT, . . . OR

ANY OTHER EQUITABLE RELIEF AS THE COURT DEEMS APPROPRIATE." 42 U.S.C. 2000E-5(G). THERE IS OVERWHELMING ROOM FOR THE INTERPRETATION OF THIS PARTICULAR SECTION OF THE STATUTE AS ALLOWING FOR GOALS AND TIMETABLES AS A REMEDY. THERE ARE THREE PHRASES IN THIS SECTION WHICH ARE CRUCIAL FOR THE INTERPRETATION WHICH I ADVOCATE. THEY ARE:

1. . . A COURT MAY ORDER SUCH AFFIRMATIVE ACTION AS MAY BE APPROPRIATE....;
2. . . . WHICH MAY INCLUDE BUT IS NOT LIMITED TO . . . ; AND
3. . . . ANY OTHER EQUITABLE RELIEF AS THE COURT DEEMS APPROPRIATE."

TAKEN EITHER INDIVIDUALLY OR COLLECTIVELY, THIS LANGUAGE OF SECTION 706(G) OF TITLE VII CLEARLY ALLOWS FOR THE ESTABLISHMENT (AND THE SUBSEQUENT ENFORCEMENT, IF NECESSARY) OF GOALS AND TIMETABLES.

MUCH OF THE CONTROVERSY CONCERNING THE APPLICABILITY OF GOALS AND TIMETABLES AS A REMEDY HAS BEEN GENERATED BY THE SUPREME COURT'S DECISION IN FIREFIGHTERS LOCAL UNION NO. 1784 VS. STOTTS, 104 S. CT. 2576 (1984). I WILL BRIEFLY DISCUSS THE FACTS OF THE STOTTS CASE IN ORDER TO CONVEY BEST WHAT, IN MY OPINION, IS A REASONABLE INTREPRETATION OF THIS CASE. IN THIS CASE, THE SUPREME COURT STATED THAT THE DISTRICT COURT HAD EXCEEDED ITS AUTHORITY UNDER TITLE VII WHEN IT ENJOINED THE MEMPHIS FIRE DEPARTMENT FROM FOLLOWING ITS LAST HIRED, FIRST FIRED SENIORITY SYSTEM IN MAKING LAYOFFS. IN THE STOTTS CASE, THE PLAINTIFF SUED THE CITY OF MEMPHIS AND ALLEGED THAT THE FIRE DEPARTMENT WAS ENGAGED IN A PATTERN AND PRACTICE OF MAKING HIRING AND PROMOTION DECISIONS ON THE BASIS OF RACE, IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964. DISCOVERY PROCEEDED, SETTLEMENT NEGOTIATIONS ENSUED, AND IN DUE COURSE, A CONSENT DECREE WAS APPROVED AND ENTERED BY THE DISTRICT COURT. THE STATED PURPOSE OF THE DECREE WAS TO

REMEDY THE HIRING AND PROMOTION PRACTICES OF THE FIRE DEPARTMENT WITH RESPECT TO BLACKS. THE CONSENT DECREE, AMONG OTHER THINGS, PROVIDED FOR A LONG-TERM GOAL OF INCREASING THE PROPORTION OF MINORITY REPRESENTATION IN EACH JOB CLASSIFICATION IN THE FIRE DEPARTMENT TO APPROXIMATELY THE PROPORTION OF BLACKS IN THE LABOR FORCE IN SHELBY COUNTY, TENNESSEE. THE DECREE, HOWEVER, DID NOT CONTAIN PROVISIONS FOR LAYOFFS OR REDUCTIONS IN RANK AND DID NOT AWARD ANY COMPETITIVE SENIORITY TO THE PERSONS HIRED UNDER THE DECREE. A YEAR AFTER THE DECREE WAS ENTERED, THE CITY ANNOUNCED BUDGET DEFICITS WHICH REQUIRED REDUCTION OF THE WORKFORCE. LAYOFFS WERE TO BE BASED ON THE "LAST HIRED, FIRST FIRED" RULE BASED ON EACH EMPLOYEE'S LENGTH OF EMPLOYMENT WITH THE CITY. STOTTS PETITIONED THE DISTRICT COURT FOR A MODIFICATION TO THE CONSENT DECREE BECAUSE THE PROPOSED LAYOFFS, IF ALLOWED TO GO INTO EFFECT, WOULD HAVE A RACIALLY DISCRIMINATORY EFFECT ON THE NEWLY HIRED BLACKS. STOTTS ALSO SOUGHT TO DECLARE THE SENIORTY SYSTEM AS NOT A BONA FIDE ONE. THE DISTRICT COURT

APPROVED MODIFICATIONS TO THE CONSENT DECREE WHICH WERE AIMED AT PROTECTING BLACK EMPLOYEES. CONSEQUENTLY, WHITE EMPLOYEES WITH MORE SENIORITY THAN BLACK EMPLOYEES WERE LAID OFF WHEN THE OTHERWISE APPLICABLE SENIORITY SYSTEM WOULD HAVE CALLED FOR THE LAYOFF OF BLACK EMPLOYEES WITH LESS SENIORITY. THE COURT OF APPEALS AFFIRMED, HOLDING THAT ALTHOUGH THE DISTRICT COURT WAS WRONG IN HOLDING THAT THE SENIORITY SYSTEM WAS NOT BONA FIDE, IT HAD ACTED PROPERLY IN MODIFYING THE CONSENT DECREE.

THE SUPREME COURT REVERSED AND HELD THAT THE DISTRICT COURT'S PRELIMINARY INJUNCTION COULD NOT BE JUSTIFIED EITHER AS AN EFFORT TO ENFORCE THE CONSENT DECREE OR AS A VALID MODIFICATION TO IT. OF PARTICULAR IMPORTANCE IS THE SUPREME COURT'S HOLDING WITH RESPECT TO THE RELIEF THAT WAS ORDERED BY THE DISTRICT COURT WHEN IT MODIFIED THE ORIGINAL CONSENT DECREE. SPECIFICALLY, THE SUPREME COURT HELD THAT THE SENIORITY RIGHTS OF WHITE EMPLOYEES HAD BEEN OVERRIDDEN TO THE BENEFIT OF BLACK EMPLOYEES. THIS, THE COURT HELD, WAS IMPROPER BECAUSE THE SENIORITY SYSTEM WAS A BONA FIDE

ONE; THE CONSENT DECREE MADE NO PROVISION FOR LAYOFFS; AND BECAUSE NEITHER THE CITY NOR THE UNION WAS A PARTY TO THE MODIFIED DECREES. IT IS MY OPINION THAT THE SUPREME COURT'S DECISION IS LIMITED TO ITS FACTS. THAT IS, A CONSENT DECREE WITHOUT SPECIFIC TERMS REGARDING SENIORITY AND LAYOFFS OBTAINED AS A RESOLUTION OF A TITLE VII CLAIM MAY NOT BE MODIFIED TO PROVIDE LAYOFF RELIEF WITHOUT THE EXPRESS CONSENT OF ALL PARTIES INVOLVED. STOTTS TO ME DOES NOT STAND FOR THE PROPOSITION THAT PROSPECTIVE RELIEF, SUCH AS GOALS AND TIMETABLES, IS IMPROPER.

MOREOVER, IT SHOULD BE POINTED OUT THAT THE STOTTS DECISION IN NO WAY INVALIDATED THE PREVIOUS SUPREME COURT'S DECISION ON THE VOLUNTARY USE OF AFFIRMATIVE ACTION PLANS THAT INCLUDE GOALS AND TIMETABLES. WEBER VS. KAISER ALUMINUM AND CHEMICAL CORPORATION, 443 U.S. 193 (1979).

IN CONCLUSION, THERE IS NO DOUBT IN MY MIND THAT GOALS AND TIMETABLES ARE BUT ONLY ONE OF THE NUMBER OF REMEDIES AVAILABLE UNDER TITLE VII. WHILE THIS COMMISSION HAS NOT ADOPTED ANY POLICY REGARDING GOALS AND TIMETABLES, THE SUPREME COURT, AS YOU KNOW, HAS BEFORE IT SEVERAL CASES ON THIS ISSUE AND I AM SURE THAT ITS DECISION WILL SHED FURTHER GUIDANCE ON THIS MATTER.

ANOTHER SUBJECT OF YOUR INQUIRY IS STATISTICAL MEASURES AND THEIR USE IN TITLE VII CLAIMS.

STATISTICS ARE AN IMPORTANT PART OF THE EVIDENCE IN TITLE VII CLAIMS. THEY ARE USUALLY, AMONG OTHER THINGS, INDICATORS OF WHETHER THERE HAS BEEN A PATTERN OR PRACTICE OF DISCRIMINATION. BUT ONE HAS TO BE CAREFUL IN THEIR USE BECAUSE ANY SET OF NUMBERS INVOLVES NUMEROUS FACTORS AND VARIABLES, ANY COMBINATION OF WHICH MAY ALSO BE SHOWN TO

DISPEL ANY INFERENCES OF DISCRIMINATION. THE COMMISSION HAS USED, AND STILL USES, GUIDELINES AND DIRECTIVES WHICH ALLOW FOR STATISTICAL MEASURES.

AS YOU MAY KNOW, THE COMMISSION PROMULGATED IN 1978 THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (UGESP), 29 C.F.R. 1607. THESE GUIDELINES ARE STILL IN EFFECT TODAY. THE COMMISSION IN JULY, 1984 VOTED TO REVIEW THE GUIDELINES AND ASKED THE OFFICE OF LEGAL COUNSEL TO PREPARE A RESOURCE PAPER FOR US. TO DATE, THAT PAPER IS STILL IN ITS DRAFT STAGES AND THERE HAS BEEN NO DECISION BY THE COMMISSION TO ELIMINATE UGESP. THE COMMISSION'S AFFIRMATIVE ACTION GUIDELINES (29 C.F.R. §1608) ALSO PROVIDE AND ALLOW FOR

STATISTICAL MEASURES, SUCH AS GOALS AND TIMETABLES. SIMILARLY, THE COMMISSION'S COMPLIANCE MANUAL, SECTION 607, SPECIFICALLY PROVIDES INSTRUCTIONS TO OUR STAFF ON HOW TO FASHION RELIEF, SUCH AS AFFIRMATIVE ACTION OR GOALS AND TIMETABLES IN EMPLOYMENT DISCRIMINATION CHARGES.

ADDITIONALLY, THE COMMISSION ALSO USES STATISTICAL MEASURES TO ISSUE AND DECIDE COMMISSIONER CHARGES. IN OUR TARGETING FOR COMMISSIONER CHARGES, STATISTICS OFTEN ARE THE PRIMARY EVIDENCE SUPPORTING THE ISSUANCE OF A COMMISSIONER'S CHARGE. THE COMMISSION HAS ISSUED AND DECIDED SEVERAL COMMISSIONER CHARGES WHICH INCLUDED STATISTICAL MEASURES AS PART OF THE EVIDENCE. ADDITIONALLY, THIS COMMISSION HAS APPROVED CONCILIATION AGREEMENTS WHICH HAVE INCLUDED GOALS AND TIMETABLES. IN FACT, THIS IS THE ONLY INSTANCE IN WHICH THE COMMISSION AS A BODY APPROVES CONCILIATION AGREEMENTS. ALL LITIGATED CASES ARE CONDUCTED BY THE GENERAL COUNSEL ON BEHALF OF THE COMMISSION.

ALL OF THESE POLICIES ARE CURRENTLY IN EFFECT AND THERE HAS BEEN NO DEVIATION FROM THEM.

FINALLY, YOU ASKED THAT WE ADDRESS MR. BUTLER'S STATEMENT TO OUR FIELD ATTORNEYS DIRECTING THEM NOT TO INCLUDE GOALS AND TIMETABLES IN EEOC SUITS. AS THE PRESENT ACTING GENERAL COUNSEL, MR. BUTLER HAS DONE A COMMENDABLE JOB IN CARRYING OUT THE COMMISSION'S DIRECTIVES IN OUR ENFORCEMENT AND REMEDIES POLICIES. WHILE I WILL NOT ATTEMPT TO ANSWER AS TO WHY MR. BUTLER MADE THIS STATEMENT, HIS STATEMENT DOES NOT REFLECT COMMISSION POLICY BECAUSE TO DATE, THE COMMISSION HAS NOT ISSUED ANY POLICY STATEMENT REGARDING GOALS AND TIMETABLES. MOREOVER, I HAVE CONSISTENTLY STATED THAT THE MANNER IN WHICH THE COMMISSION VOTES ON ANY PARTICULAR CASE DOES NOT, IN MY OPINION, ESTABLISH COMMISSION POLICY.

IN SUM, AND AS I PREVIOUSLY STATED, THE COMMISSION HAS NOT, AS A MATTER OF POLICY, FORMALLY OR OTHERWISE, MOVED AWAY FROM THE USE OF GOALS AND TIMETABLES AS A REMEDY UNDER TITLE VII. NEVERTHELESS, ALTHOUGH THERE MAY BE DISAGREEMENT BETWEEN THE FIVE OF US ON THE COMMISSION REGARDING THEIR USE IN TITLE VII, THERE IS ONE THING THAT THIS COMMISSION DOES WANT TO MAKE CLEAR--AND THAT IS THAT WE WILL ENFORCE ALL THE LAWS WITH THEIR FULL FORCE AND EFFECT IF THERE HAS BEEN A FINDING OF DISCRIMINATION AND A FAILURE OF CONCILIATION.

PREPARED STATEMENT OF WILLIAM A. WEBB, COMMISSIONER, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Mr. Chairman, members of the subcommittee, I welcome this opportunity to appear before you with my colleagues to discuss my views and the Commission's policies on the use of Goals, Timetables and Statistical Measures in the Enforcement of Anti-Discrimination laws.

Goals and Timetables

While the Equal Employment Opportunity Commission has used goals and timetables and continues to do so, I believe that they are an ineffective substitute for meaningful remedies. They often require victims of discrimination to trade jobs or promotions for promises of "good faith" efforts to hire or promote someone who shares some general characteristic with them. As we all know, discrimination takes place solely as a result of group differences. The effects of these unlawful practices have been pervasive. Indeed, the effects of years of segregation and legal discrimination can still be seen in the American workplace. The paucity of minorities and women in the higher paying skilled jobs and in middle and upper management is not the result of chance, but often of unconscionable choice. While it may be appealing to some to provide remedies which offer quick fix solutions to these vestiges of past exclusion, the use of group preferences, even if they provided an effective remedy, is wrong.

I believe that the use of group preferences as a remedy for discrimination runs counter to the purposes underlying Title VII of the Civil Rights Act of 1964. These purposes, as identified by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971), were "To achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."

Those purposes were reflected in the clear and unambiguous language used by Congress in the last sentence of section 706(G):

> No order of the Court shall require the ... hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay, if such individual ... was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(A).

In addition, the legislative history of the Act reinforces my belief that the statute was intended to provide equal opportunity, not racial balance. Senator Hubert Humphrey's remarks during the Senate Debate on Title VII, prior to the Act's passage, could not have been more explicit: "Contrary to the allegations of some opponents of this Title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial quota or achieve a certain racial balance." (Emphasis supplied.) To effectuate what Congress intended, and what workers have a right to expect, the Commission has promulgated a remedies policy statement which directs our employees to insist on full relief for victims of discrimination. These remedies are being sought in both the administrative process and through litigation.

Finally, the legality of the use of goals and timetables has been called into question by a recent case decided by the U.S. Supreme Court, Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984). In Stotts the Court, after reviewing the legislative history of Title VII, concluded that the policy underlying the Act was "... to provide make-whole relief only to those who have been actual victims of discrimination ...." Id. at 2589. Three other cases which were argued this term should resolve the issue of the legality of the use of goals and timetables. (Local 28 v. EEOC, et al., Sup. Ct. No. 84-1656, Local 93 v. City of Cleveland, et al., Sup. Ct. No. 84-1999 and Wygant v. Jackson Bd. of Education, Sup. Ct. No. 84-1340.)

Use of Statistics

The Supreme Court in International Brotherhood of Teamsters v. U.S. 431 U.S. 324(1977) reaffirmed the use of statistical evidence to prove unlawful discrimination. There the court indicated that;

> [O]ur cases make it unmistakably clear that 'statistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue ...

Id. at 339. My personal view on the use of statistics is consistent with that of the Supreme Court. Like the Court, however, I believe that "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." Id. at 340.

The Commission has consistently used statistical methods, when appropriate, in its determinations regarding the existence of unlawful discrimination.

Proposed Modifications to Regulations

With respect to the question concerning "... EEOC's proposed draft modifications to its current regulations", the Commission has not voted to review its Guidelines on Affirmative Action which are applicable to private sector employers. And, although the Commission's regulations on affirmative action in the federal sector, Management Directive 707, and The Uniform Guidelines on Employee Selection Procedures, are under review by the Commission's staff, I am neither in receipt of, nor aware of, any proposed modifications to these Commission regulations. I am aware, however, of the Chairman's stated intention to propose changes to some of these regulations. But, to date, nothing has been presented to the Commission.

Prepared Statement of R. Gaull Silberman, Commissioner, Equal Employment Opportunity Commission

GOOD MORNING CHAIRMAN MARTINEZ AND MEMBERS OF THE SUBCOMMITTEE. I APPRECIATE THE OPPORTUNITY TO JOIN MY COLLEAGUES IN RESPONDING TO THE QUESTIONS POSED IN YOUR FEBRUARY 21, 1986 LETTER. I WILL BE PLEASED TO EXPAND ON THESE VIEWS OR ANSWER ANY FURTHER QUESTIONS YOU MAY HAVE.

1. INDIVIDUAL PERCEPTION OF THE LEGALITY OF THE USE OF GOALS, TIMETABLES, AND STATISTICAL MEASURES IN THE ENFORCEMENT OF ANTIDISCRIMINATION LAWS.

BECAUSE YOU HAVE ASKED FOR MY INDIVIDUAL PERCEPTION OF THE LEGALITY OF GOALS, TIMETABLES, AND STATISTICAL MEASURES, I SHOULD LIKE TO STATE AT THE OUTSET THAT I AM NOT A LAWYER. MY INDIVIDUAL PERCEPTIONS ARE BASED ON MY READING OF THE STATUTES AND THEIR LEGISLATIVE HISTORY IN THE CONTEXT OF MY ROLE AS A COMMISSIONER AND THE EEOC'S RESPONSIBILITY AS A LAW ENFORCEMENT AGENCY. I ANSWER THESE QUESTIONS IN THAT SAME CONTEXT.

MY READING OF THE STATUTES WE ENFORCE (TITLE VII, THE AGE DISCRIMINATION IN EMPLOYMENT ACT, AND THE EQUAL PAY ACT) AS WELL AS THE LEGISLATIVE HISTORY WHICH LED TO THEIR PASSAGE, IS THAT THESE LAWS NEITHER REQUIRE NOR PERMIT THE COMMISSION TO IMPOSE PREFERENCES BASED ON RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN. THIS VIEW IS SET OUT IN §§ 703(J) AND 706(G) OF TITLE VII AND IS CONSISTENT WITH THE RECENT DECISION OF THE SUPREME COURT IN STOTTS.

MY PERCEPTIONS ARE BASED ON MY READING OF THE PLAIN LANGUAGE OF THE STATUTE, AND ALSO ON THE LEGISLATIVE HISTORY WHICH I BELIEVE MAKES CLEAR THE INTENT OF THE FRAMERS THAT THE PURPOSE OF TITLE VII WAS TO ELIMINATE CONSIDERATION OF RACE IN EMPLOYMENT DECISIONS. AS SENATOR HUBERT HUMPHREY EMPHASIZED, TITLE VII "DOES NOT PROVIDE THAT ANY QUOTA SYSTEMS MAY BE ESTABLISHED TO MAINTAIN RACIAL BALANCE IN EMPLOYMENT. IN FACT, THE TITLE WOULD PROHIBIT PREFERENTIAL TREATMENT...." SENATOR JOSEPH CLARK EXPLAINED THAT TITLE VII "SIMPLY ELIMINATES COLOR FROM THE DECISION TO HIRE OR PROMOTE." TO REQUIRE OR ENCOURAGE DISCRIMINATION IS FUNDAMENTALLY INCONSISTENT WITH A LAW WHOSE PURPOSE IS TO RENDER RACE IRRELEVANT IN EMPLOYMENT DECISIONS.

THE SUPREME COURT HAS, OF COURSE, CARVED OUT A NARROW EXCEPTION TO THE RULE OF NONDISCRIMINATION IN THE WEBER CASE, PROVIDING FOR LIMITED, VOLUNTARY RACIAL PREFERENCES BY PRIVATE EMPLOYERS IN CERTAIN CIRCUMSTANCES. I BELIEVE, HOWEVER, THAT WEBER REPRESENTS A NARROW EXCEPTION TO THE RULE, AND THAT INSOFAR AS GOVERNMENT (THE EEOC) IS INVOLVED IN COURT ORDERS AND IN VOLUNTARY SETTLEMENTS, RACIAL PREFERENCES ARE IMPERMISSIBLE UNDER TITLE VII.

THE SUPREME COURT IS CURRENTLY CONSIDERING THE LEGALITY OF GOALS AND TIMETABLES IN THREE CASES NOW PENDING. WE LOOK FORWARD TO THE COURT'S RESOLUTION OF THIS ISSUE.

TURNING TO PRACTICAL CONSIDERATIONS, IN REVIEWING CASES THAT ARE BEFORE THE COMMISSION, I HAVE COME TO SEE THAT GOALS AND TIMETABLES WEAKEN OUR ENFORCEMENT OF TITLE VII. GOALS AND TIMETABLES ARE A POOR SUBSTITUTE FOR THE REQUIREMENT OF NONDISCRIMINATION THAT THE LAW COMMANDS. BY SEEKING GOALS AND TIMETABLES INSTEAD OF FULL RELIEF, THE COMMISSION OFFERS EMPLOYERS AN EASY "OUT," SHORTCHANGING VICTIMS OF DISCRIMINATION. IN MY VIEW, THE COMMISSION ABDICATES ITS RESPONSIBILITY UNDER THE ACT TO ELIMINATE DISCRIMINATION WHEN IT EXCHANGES FULL RELIEF FOR GOALS AND TIMETABLES.

AS TO MY INDIVIDUAL PERCEPTION OF THE LEGALITY OF STATISTICAL MEASURES, AS I UNDERSTAND IT, THE SUPREME COURT MADE "UNMISTAKABLY CLEAR" IN THE TEAMSTERS CASE, THAT "STATISTICAL ANALYSES HAVE SERVED AN IMPORTANT ROLE IN CASES IN WHICH THE EXISTENCE OF DISCRIMINATION IS A DISPUTED ISSUE." STATISTICS ARE ALSO IMPORTANT IN ESTABLISHING AN INFERENCE OF DISCRIMINATION AND BUTTRESSING ANECDOTAL EVIDENCE.

BUT, JUSTICE STEWART ALSO POINTED OUT IN TEAMSTERS THAT STATISTICS "COME IN INFINITE VARIETY AND, LIKE ANY OTHER KIND OF EVIDENCE, THEY MAY BE REBUTTED.... THEIR USEFULNESS DEPENDS ON ALL OF THE SURROUNDING FACTS AND CIRCUMSTANCES."

FINALLY, AS THE SUPREME COURT HAS RECOGNIZED IN CONNECTICUT V. TEAL, BOTTOM LINE STATISTICS SHOULD NOT BE USED AS A DEFENSE AGAINST CHARGES OF DISCRIMINATION. EMPLOYERS HAVE AN ABSOLUTE RESPONSIBILITY TO ENSURE THAT EACH AND EVERY EMPLOYMENT DECISION IS NONDISCRIMINATORY. A BOTTOM LINE THAT REFLECTS PROPORTIONAL REPRESENTATION IS NO SUBSTITUTE.

I HAVE SERIOUS RESERVATIONS WHEN STATISTICS ARE USED AT THE REMEDY STAGE. SECTION 703(J) OF TITLE VII PROHIBITS ANY REQUIREMENT OF RACE BALANCING. THE USE OF STATISTICS AT THIS STAGE OFTEN LEADS TO JUST THAT. STATISTICS SHOULD NOT BE USED TO ESTABLISH A CEILING ON RELIEF EVEN THOUGH THE COMMISSION IS FREQUENTLY URGED TO USE THEM IN PRECISELY THAT WAY.

2. EEOC'S POLICIES IN REGARD TO THE USE OF GOALS, TIMETABLES, AND STATISTICAL MEASURES.

THIS COMMISSION, LIKE ITS PREDECESSORS, APPROPRIATELY ADDRESSES POLICY ISSUES, INCLUDING GOALS AND TIMETABLES, WHEN IT EXERCISES ITS PROSECUTORIAL DISCRETION ON A CASE-BY-CASE BASIS, AS IS APPROPRIATE FOR A LAW ENFORCEMENT AGENCY.

THE ONLY GENERAL POLICY GUIDANCE, IN EFFECT FOR SOME TIME, IS 1) MANAGEMENT DIRECTIVE 707 WHICH IMPLEMENTS SECTION 717(B) OF TITLE VII AND DEALS WITH AFFIRMATIVE ACTION PROGRAMS OF EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT AND 2) THE EEOC'S AFFIRMATIVE ACTION REGULATIONS WHICH ESSENTIALLY TRACK THE WEBER DECISION AND PROVIDE A SAFE HARBOR DEFENSE FOR EMPLOYERS WITH VOLUNTARY AFFIRMATIVE ACTION PROGRAMS.

ON THE QUESTION OF STATISTICS, THE PRIMARY POLICY GUIDANCE EXISTS IN THE FORM OF THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (UGESP). THESE GUIDELINES ARE PRESENTLY UNDER REVIEW BY THE STAFF, AND WE ARE AWAITING THEIR REPORT. UNTIL SUCH TIME AS IT IS AMENDED, UGESP WILL CONTINUE TO REPRESENT COMMISSION POLICY.

3. EEOC'S APPLICATION OF THESE LAWS.

I AM COMMITTED TO THE VIGOROUS APPLICATION OF THE LAWS THAT THE COMMISSION ENFORCES. TO THAT END, UNDER THE LEADERSHIP OF CLARENCE THOMAS, THIS COMMISSION HAS INTENSIFIED ITS LITIGATION PROGRAM. WE FILED MORE LAWSUITS IN THE FIRST QUARTER OF FY '86 THAN IN ANY FIRST QUARTER IN OUR HISTORY.

I BELIEVE THAT OUR REMEDIES AND ENFORCEMENT POLICIES, IN CONCERT WITH OUR REVITALIZED SYSTEMIC PROGRAM (PATTERN AND PRACTICE CASES), WILL DEMONSTRATE OUR CONTINUING COMMITMENT TO EFFECTIVE LAW ENFORCEMENT.

4. EEOC'S PROPOSED DRAFT MODIFICATIONS TO ITS CURRENT REGULATIONS.

I HAVE NOT SEEN ANY PROPOSED MODIFICATION AND THEREFORE CANNOT COMMENT.

5. JOHNNY BUTLER, ACTING GENERAL COUNSEL

FINALLY, YOU DIRECT MY ATTENTION TO THE RECENT NEWS ACCOUNTS REGARDING MR. JOHNNY BUTLER. I WOULD LIKE TO TAKE THIS OPPORTUNITY TO COMMEND MR. BUTLER FOR THE JOB HE HAS DONE AS ACTING GENERAL COUNSEL. A GENERAL COUNSEL MUST, OF COURSE, MAKE CHOICES AS TO LITIGATION RESOURCE ALLOCATION. ON THE BASIS OF THE VOTING PATTERNS THAT I HAVE SEEN IN MY 15 MONTHS ON THE COMMISSION, I CAN SAY THAT MR. BUTLER'S REPORTED STATEMENTS WERE LOGICAL, APPROPRIATE, AND ACCURATELY REFLECT JUST THAT--PAST VOTING PATTERNS FROM WHICH A REASONABLE PERSON WOULD HAVE DRAWN THE SAME CONCLUSION.

Mr. **Martinez**. At this time, because of the full committee's markup, we will go to Chairman Hawkins first for a round of questions of the Commissioners so that Chairman Hawkins may be able to leave us.

Chairman **Hawkins**. I used so much of your time, Mr. Chairman. May I yield my time to some of the other members, please?

Mr. **Martinez**. All right. Thank you, Chairman Hawkins.

Mr. Hayes.

Mr. **Hayes**. I am going to the same markup. I do not have any questions of these witnesses at this time.

Mr. **Martinez**. I have several.

In reading the testimonies, I come to the conclusion that there are two of you in favor of timetables and goals and two of you are not, and one of the two that are not seems to have a feeling that—and maybe that is an inference that I get; it was not written in—that there may be some reason to believe that there is some equitable and legal reason for using timetables and goals.

For my first question, I would like each one of the Commissioners to expound on their own personal views regarding the use of timetables and goals. We will start with the Honorable Rosalie Silberman.

STATEMENTS OF A PANEL CONSISTING OF HON. TONY E. GALLEGOS, HON. WILLIAM A. WEBB, HON. FRED W. ALVAREZ, HON. ROSALIE GAULL SILBERMAN, COMMISSIONERS, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Commissioner **Silberman**. Thank you.

I want to first of all thank you all for the opportunity to appear with my colleagues this morning.

You asked for my individual perception of the legality of goals, timetables, and statistical measures. As I wrote in my testimony, I have to start out by saying that like you, Chairman Martinez, I am not a lawyer and that I have looked at these things in the context of my role as an EEOC Commissioner.

In that context, in the 15 months that I have been on the Commission, it seems to me that the clear language of the statute is critical. In 706(g) which was read by two of you, the last sentence is enormously important: "No order of the court shall require * * *" I think those are very important words.

My reading of the legislative history buttresses that feeling, but I think most importantly, I would like to address the efficacy of goals and timetables because it has become very clear in my 15 months on the Commission that what generally happens with goals and timetables is that they become like a cheap date. Employers like them. They are less expensive than "make whole" relief, and as a result, we go for them to the detriment of often 90 percent of our identified victims.

Earlier I believe Mr. Butler was asked to quote a case. We were just given a case last week. I cannot give you the name of it because of our confidentiality requirements, but that case clearly showed that 90 percent of the identified victims were getting less than "make whole" relief in return for goals and timetables, and we were told that those goals and timetables were insisted upon by the respondent employer.

In my view, as a Commissioner, I think that the use of goals and timetables by the EEOC is of questionable legality. The Supreme Court will certainly rule on that legality. But more importantly, it is my view that goals and timetables weaken the enforcement of title VII.

Mr. MARTINEZ. From the statement you just made I assume that in order to make right a discriminatory situation that has existed for many years only is to require employers to have some kind of affirmative action plan. Any affirmative action plan has to include timetables and goals. Otherwise, of individual abuses will continue to occur, and would have continued to a greater degree on a greater number of people had there not been timetables and goals ordered by that court. Goals and timetables are a remedy to past discrimination and maybe you might say, "Well, it put them in the position to be discriminated against even further", but that is ridiculous. It offered disadvantaged individuals an opportunity, and now it is your responsibility to pursue it from that point in time.

The timetables and goals got us to this point. Now what we have to do is to make sure that there is no further discrimination. If an employer assumes that by giving you a report he or she is fulfilling a court mandate requiring timetables and goals, and that all is now well, and if you want to walk away from it and assume that that problem is taken care of, yes, I can agree with you. But that would be bad, and that would be a bad use of timetables and goals.

But you have got to have further sight to realize that without the initial action of timetables and goals, those people would never have been given the opportunity to employment. Yes, they may never have been given the opportunity to be discriminated against further, but, if you look at it in a positive way, those people are in a place where they have a chance at meaningful, gainful employment and upward mobility. They now have courage because of a previous action and can take comfort knowing that there is an agency in place that will make them whole should discrimination continue.

So I say it is an obligation, a responsibility of yours as a Commissioner charged with the enforcement of title VII itself to come forward and say that you will monitor employment discrimination and, on those occasions when it does occur, you will not say that, "Hey, affirmative timetables and goals are bad". Rather, you should say that within the framework of timetables and goals, you will make sure that a person is made whole, further emphasizing to that discriminated person that we are no longer going to tolerate discrimination.

Give me your response to that.

Commissioner SILBERMAN. Thank you, Chairman Martinez.

I see my obligation as a serious one. I see it in the same way that you framed it in the sense that we have to see that, just as past discrimination is remedied, future discrimination is avoided. I guess that I have to say that I have to respectfully disagree with you that goals and timetables are the only way to do that. I think that——

Mr. MARTINEZ. No, I did not say that they were the only way to do it. I said that discriminated persons have got to get a foot in the door and one way that the Court can remedy discrimination is to require employers to start an affirmative action plan, and that affirmative action plans require timetables and goals.

Goals and timetables are not quotas. They do not set limits. There is no limit that is set except the ones you set on yourself. The Court did not set it. If we in our minds set it, then we have set it.

Commissioner SILBERMAN. I believe the language of the act makes it clear, but I guess I have to agree that this is something on which reasonable men and women can differ.

Mr. MARTINEZ. Well, it was stated by your attorney that one is not exclusive of the other, that they——

Commissioner SILBERMAN. If you are asking me that question, I agree with my attorney. They are not exclusive.

Mr. MARTINEZ. Thank you.

Mr. Webb.

Commissioner WEBB. Chairman Martinez, Chairman Hawkins referred to me twice in his questions and implied somehow that I had disapproved the general counsel's actions. I would like to respond to that briefly before I go on to the other.

Mr. MARTINEZ. All right. Fine.

Commissioner WEBB. Over the course of the past 21 months, Johnny Butler and I have had extensive conversations about goals and timetables. At one point after one such discussion, I told him I would try to set my views forth in an op. ed. piece, which was subsequently published.

To the extent that we have talked about it after that, he has been on notice of my position on goals and timetables, which I will go on to state in 1-minute.

Chairman Hawkins also referred to comments I had made or a quote attributed to me in the "Baltimore Sun." I should state for the record I have never talked to a reporter from the "Sun." I believe that article was based on a conversation I had with a reporter from the Associated Press.

At that time, we talked about how policy was made at the Commission, and in response to a question, I said I did not prefer a process whereby ad hoc policy decisions were made by the acting general counsel.

I should hasten to add, however, that I think anyone listening to the general counsel's testimony this morning has to come away with the conclusion that he made a management decision based upon his perception of where the Commission was as a majority, and absent any express policy guidance to the contrary.

Mr. MARTINEZ. Let me just interrupt you for a moment. In your confirmation hearing in 1983, you stated that you supported affirmative action policies with timetables and goals in them. Have you altered your position?

Commissioner WEBB. Yes, I have.

Mr. MARTINEZ. All right. Very good.

Commissioner WEBB. I came to the job without any background in civil rights law, although I had had extensive background in civil rights work. During the course of the 3½ years I have been on the Commission, I have had occasion not only to read title VII, to reread it, to look at the legislative history, but to also see how this Commission operates.

I believe the first reason I state in my testimony for my opposition to goals and timetables, that they are largely ineffective. They are ineffective in providing remedies for those persons Congress, I believe, intended to make whole, the victims of discrimination.

Mr. MARTINEZ. Let me interrupt you again because in your written testimony you address that. One point that comes through very clear, something that comes through this whole hearing, is that somebody thinks that because you apply timetables and goals, you do not apply specific remedies to specific people. Timetables and goals are to work in conjunction with specific remedies, one with the other.

You cannot get people to a position, as I just stated to Ms. Silberman, where they would even be discriminated against at all in specific cases had you not ordered through the courts and through sometimes voluntary negotiation with the EEO Commission in the past a timetables and goals procedure in which they would establish employment where they had denied employment before.

So now you get to the point where what you are talking about is absolutely right. Timetables and goals in themselves do not take care of a specific situation.

But basically we are talking about a mass of people that were discriminated against, and there is a remedy for that through affirmative action. But now you have got them in a position where you might have to pursue it through specific means, by specific cases, and nobody is denying that you should do that.

Nowhere does it say that because you adopt affirmative actions or timetables and goals that you are not going to take care of those specific cases. I do not understand where there is a conflict in your minds that because you have timetables and goals, you cannot pursue individual, specific cases of discrimination.

Commissioner WEBB. Mr. Chairman, I was about to answer the question. I do not believe, as the general counsel does not believe, that they are mutually exclusive. The first basis I have is that they are ineffective. They are ineffective in providing remedies to victims of discrimination.

Up until 1964——

Mr. MARTINEZ. Here again, they are ineffective. They were not intended to provide that. So you do have to provide that other, but I do not know how you can correlate the two. Explain to me how you correlate the two.

Commissioner WEBB. Well, I am trying to, and each time I go back to——

Mr. MARTINEZ. All right. Proceed.

Commissioner WEBB [continuing]. Proceed, you interrupt.

I believe they are ineffective.

Mr. MARTINEZ. Excuse me. I am demonstrating some of the frustration that Mr. Hayes talked about. Go ahead.

Commissioner WEBB. They are ineffective.

The second point in my disagreement with them is a reading of the plain language of the statute. I believe that that supports my view that they were never intended by Congress to be a remedy.

The third thing or the third point is that that is reinforced by Senator Humphrey's remarks which I quote to you: "that these statutes will not be used to achieve a racial balance."

To me the idea of setting goals and timetables presupposes the end result being a work force that reflects the racial or ethnic or sexual background of the work from which that work force is drawn. I just do not believe there is any support for that in title VII.

Moreover, I think the *Stotts* decision has, in fact, called that into question, and to that extent my views have, in fact, changed.

Mr. MARTINEZ. Well, in the *Stotts* case, six appellate courts held different to your opinion, different to Brad Reynolds' opinion, different to Edwin Meese's opinion. Of course, it will eventually be decided by the Supreme Court.

But that aside, I think you are absolutely wrong when you say that the Congress never intended that timetables and goals be a remedy because in actuality, what the Congress envisioned was that they would put in place something that would say you cannot discriminate, and then allow those employers to go about the business of doing that which was necessary to do.

As the court has stated, any situation and any remedy that is necessary to overcome that particular situation is valid; that gives it the legitimacy that you people seem to ignore.

Commissioner WEBB. I think each of us focuses on different sentences in the statute. I think they have to be read in conjunction. One is a limitation on the other.

Mr. MARTINEZ. I am going to right now refer to the testimony because I was tremendously impressed with the testimony of Commissioner Gallegos and Alvarez. In each of the testimonies addressing that different view, I would like for the committee to hear it now.

Commissioner Gallegos.

Commissioner GALLEGOS. Thank you, Mr. Chairman.

You have before you my written testimony concerning goals and timetables. I just want to very briefly go over it. I know there is the pressure of time.

First, as I pointed out in my statement, I believe in the proper use of goals and timetables as a remedy under title VII. Although goals and timetables have not been as effective for Hispanic or American Indians, primarily because historically, of course, national origin discrimination has not been a major focus of past Commissions, and no major impact litigation has been brought on behalf of Hispanics or American Indians to my knowledge.

Section 706(g), in my opinion, allows for the use of goals and timetables. It specifically provides that a court may enjoin the respondent from engaging in unlawful employment practices and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees or any other equitable relief as the court deems appropriate.

I think that is my position on goals and timetables. Thank you.

Mr. MARTINEZ. In another part of your testimony you say "or any other remedy that the court deems appropriate," and therein lies the gist of the whole thing.

Commissioner GALLEGOS. I agree.

Mr. **Martinez.** Any other equitable relief as the court may deem appropriate.

Commissioner **Gallegos.** Until such time as the Court comes up with theirs.

Mr. **Martinez.** That is right.

Commissioner Alvarez.

Mr. Alvarez, you are an attorney, are you not?

Commissioner **Alvarez.** Yes.

I submitted a written statement on this point, and I would like to just make a brief summary of my position with respect to the question and make a couple of points.

My own legal analysis indicates that goals, timetables and statistical measures continue to be an available remedial technique in helping to dismantle and affect patterns and practices of discrimination. My written statement makes very clear the basis of that understanding.

Courts have found that goals serve some valuable functions. On the other hand, courts have also recognized that such statistical techniques should only be used with caution because if they are used carelessly, they can undermine the basic proposition of title VII.

Despite the availability of those techniques though, I respectfully disagree that they are the most effective tool available. I do not think goals should be used by themselves, and I do not think they should be used to manipulate the composition of a workforce. That use of goals does nothing to further the remedial purpose of changing an employer's discriminatory practices.

As convinced as I am about the legal availability of the goals, I am equally convinced that this Commission needs to have a discussion concerning the circumstances under which those measures are appropriate and what the countervailing risks are. In my view, the Commission is having just that discussion, and I think we need to be doing what we are doing.

Because of the range of views on the Commission, I understand the general counsel's decision to give interim advice to our staff attorneys not to seek goals and timetables. Those interim discussions, however, will not prevent the Commission from continuing to seek a consensus on these issues.

Finally, let me make one other point. I am concerned that the public debate which has so narrowly focused on goals and timetables is misleading the public served by title VII and tbe other laws that we enforce. Victims or potential victims of discrimination need to know that despite this debate, this Commission is fully committed to investigating and remedying any employment discrimination they have suffered. Employers and unions and employment agencies need to know that this Commission is fully committed to detecting patterns and practices of discrimination and seeking relief designed to correct and cure that discrimination.

We are having an important discussion about the propriety of statistically based race, sex and ethnic conscious relief in pattern and practice cases. However, the public focus on that discussion should not be allowed to obscure the fundamental law enforcement mission to which this Commission has so vigorously and unanimously committed itself.

Mr. MARTINEZ. Thank you.

Commissioner Alvarez, I agree with you that the Commission should have a discussion on this, an established policy, which it has not done, but the debate has been focused so narrowly on timetables and goals because that has been made the issue by the actions of the Commission and by the actions of Mr. Butler.

But you are quite right that timetables and goals by themselves are not the remedy and never were intended by Congress or anyone else that it be the sole remedy, as you just alluded to. It is not the sole remedy, and there are many, many other things that you have to do.

Fighting discrimination is an ongoing fight. We cannot change people's attitudes that were generated over hundreds of years overnight. It is going to take years and years of education. It is going to take years and years of diligent work by a Commission that is dedicated to any avenue that addresses that discrimination, especially in the workplace.

I think that you are right. Rather than focusing so narrowly on the one, we ought to be talking about the whole thing as a total picture, and we are seeing how we can really effectively work individual cases so that those individual cases and settlement of those cases furthers the goals or the direction set by a firm agency. Timetables and goals start on individual out in the right direction.

You say there has been discrimination in this particular area for many years. Because of court-imposed remedies or because of negotiated remedy, you say you will put in place timetables and goals. In effect, that is an affirmative action plan, which a company will undertake to put people in place.

You do two things. You educate that person who has discriminated in the past, by making him see that maybe discrimination has been harmful to him, himself, and there is something to someone that he has not seen before or worked with before that might offer an asset to him. If he still persists in that discrimination and says, "I will only accept to a certain point," then you are right, absolutely right, that you have got to pursue that even further.

In those specific cases where this individual has not been completely educated to the rights of others, let him continue to be educated because of the pursuance of the Commission in its endeavor to eradicate discrimination.

So I think, yes, you are right. We need to have a discussion, but we cannot have the Commission so focused on the view that timetables and goals are harmful because they are not. They initially establish the first right, and after establishing that first right, you have got to go from there.

So if you are going to be a balanced Commission, you are going to look very carefully at any kind of reverse discrimination that Brad Reynolds or Edwin Meese talk about because nobody wants to create that either. But by the charge of the law and the title itself, we cannot allow discrimination, and we have got to have some immediate mechanism to start in that direction.

Let me ask you this. I want to commend your written testimony, and you to, Mr. Gallegos. All of you provided excellent testimony, but I was particularly impressed by your testimony, and I would like for you to tell me: Is it your view that title VII contemplates prospective remedies which are different than the "make whole" remedies espoused by others here, and can you tell me the difference with regard to specific, identifiable victims?

Commissioner ALVAREZ. Well, I am not sure I understand the question. There is a difference under the law between prospective relief and make whole relief, and I tried in my statement to make clear exactly that.

I think you will see from all of our statements a slightly different cut on this issue because the courts have always recognized the inherent risks in using race conscious relief, and it does not surprise me that a group of people like us, who are all committed to enforcing these laws, might weigh those risks differently, and it does not surprise me actually that we are weighing them differently the way we are because it is a very tricky subject and has always been from the day they were started.

When you are talking about prospective relief, you are talking about stopping the discrimination. We are struggling ourselves to find better ways to stop the discrimination in the future, and I think that is what the discussion is about.

Mr. MARTINEZ. Yes, I think you are absolutely right.

Now, you have commented on the Commission's case-by-case approach in your testimony. You have outlined a lot of cases there, which I read with a great deal of interest, and from that I am going to ask you then: Do you agree with Mr. Butler's decision and what Mr. Hawkins described as an ad hoc decision to unilaterally oppose all future cases employing timetables and goals?

Commissioner ALVAREZ. Before I took this job, I was a lawyer. Mr. Butler has a very tough job. He has got five clients. All of us are expressing views about policy, views about law. He read his clients the way he read them, and he read that three of his clients thought this was not the kind of remedial technique we should be seeking. He issued interim instructions to that effect.

I understand that as a lawyer. The point I want to leave you with is that those interim instructions are not going to stop the Commission from continuing to find effective ways to deal with it, and perhaps some form of goals and timetables.

My point is the discussion will continue. All of the Commissioners are interested in this area, but he had a decision to make because he has a store to run, and as a lawyer he has five clients, and he counted three of them who said, "We do not want to do this any more."

Mr. MARTINEZ. Thank you.

Commissioner ALVAREZ. I cannot quarrel with his assessment.

Mr. MARTINEZ. Thank you.

Mr. Hayes.

Mr. HAYES. Mr. Alvarez, my question is not directed to you, but it is directed to you, Ms. Silberman.

In Mr. Alvarez's written testimony, he cites several cases that have gone through the courts: One, *Thompson* v. *Sawyer*, which the court concluded and the judge decided that goals provide necessary incentive, and I am quoting pretty much, to make a dilatory or obstructive employer offer employment opportunities on a genuinely nondiscriminatory basis.

United States v. *City of Alexandria,* race conscious goals help counteract hidden forces in the employer's selection system that had tended to favor qualified whites over other qualified candidates.

NAACP v. *Allen,* the fifth circuit court, goals help to remove the outward and visible signs of yesterday's racial distinctions.

And, finally, *Carter* v. *Gallagher,* goals counteract effects of past discrimination by providing positive assurance to minority members that, if qualified, they will be hired on more than a token basis.

Now, do you agree or disagree with these conclussion?

Commissioner SILBERMAN. Congressman Hayes, let me start by saying that I have not read those cases, and so I do not know the context in which it was said, and so it is hard for me to comment on whether I agree or disagree with them.

I am in a unique position on this Commission. I am the only woman on the Commission, but I am also the only person on this Commission who happens to be married to a judge, and I can tell you that sometimes they are wrong. I do not know if they are wrong on this one, but I know from personal experience——

Mr. HAYES. Are you saying that these cases could be true or not true? They are a matter of record.

Commissioner SILBERMAN. I am sure they could be true or not true. I think that that is accurate. I have not read them, and so I cannot comment on whether or not I agree with them.

Mr. HAYES. You agree or disagree?

Commissioner SILBERMAN. I cannot comment on whether I agree or disagree because I cannot comment on the context. I will be delighted to look at them and write you about them.

Mr. HAYES. What about you, Mr. Webb?

Commissioner WEBB. Mr. Hayes, the Allen case, I think I would have phrased it differently. I think this Commission exists to make sure that qualified members of minority groups and women are hired in more than token numbers. I think that the enforcement programs we put in place were geared up to do that.

I think each of those decisions stands on its own. They are settled law. The judges were faced with facts, faced with the law at the time, and made conclusions. I do not quarrel with any conclusion a court makes. That is settled, final.

Mr. HAYES. Do you see an alternative?

Commissioner WEBB. Do I see an alternative to goals and timetables? Sure. It was interesting. I read in a brief submitted by some members of the Congress in the case that is before the Court that we had cease and desist power. I wish that we had. It was inaccurate, but it would have been useful.

I think also that in the area of monopolies, Congress intended that employers get a message. They built in treble damages. In the Age Act, when Congress was serious about sending a message to employers to provide for liquidated damages, our statute is remedial. I do not see anything wrong with it being punitive. I do not see anything wrong with bankrupting companies that continue to discriminate.

I think there are a whole host of ways that we can provide opportunities. This Commission exists to ensure that people who apply for jobs or are considered for promotions have those decisions based on nondiscriminatory factors. I think this Commission has a responsibility to make sure that happens.

Mr. HAYES. Our problem is we have to look at this issue of goals and timetables in the context of the law as exists today. I do not want to do too much crystal ball gazing.

At least as the law exists today, and now that is you, Ms. Silberman, is there another alternative?

Commissioner SILBERMAN. To goals and timetables? Oh, I think that we are vigorously pursuing other alteratives.

Mr. HAYES. What is it? May I ask?

Commissioner SILBERMAN. Well, in that same context that I spoke about earlier, when cases come to us and goals and timetables are suggested to us as the possible remedy, and 90 percent of the people are not made whole, then we very clearly and loudly say, "Go back, and make 100 percent of those people whole." That is what the Congress put us in business to do.

Yes, I believe there is a very strong alternative in place. That is not to say that I would not like to see title VII strengthened, but I do think that the alternative is right there, and that we have traditionally not used it because goals and timetables were easier.

Mr. HAYES. Without goals and timetables, how do you identify victims of discrimination?

Commissioner SILBERMAN. Congressman, the victims are identified at the beginning of the process. They file charges. We then identify the class. We go forward on the basis of the identified class that is what Commissioner charges are for. That is what the systemic program is all about.

The identification of victims, it seems to me, is something that is very clearly set out in our procedures; goals and timetables do not have anything to do with that.

Mr. MARTINEZ. Will the gentleman yield?

Mr. HAYES. I will be glad to yield, Mr. Chairman.

Mr. MARTINEZ. You said class of people. You know, when you talk about class of people, you are talking about prospective relief.

Commissioner SILBERMAN. I am sorry, Congressman. My understanding is that that is not true. Classes of people are persons who have been identified as similarly situated and discriminated against.

It's for prospective relief, an injunction is prospective relief.

Mr. MARTINEZ. Absolutely, and when you have had class discrimination. It is in that regard when you talk about class discrimination. You have got to first find the case. Somebody has got to file a complaint.

In many cases that has come about after a long history of that kind of discrimination so that there are thousands, maybe hundreds and thousands of people, that have probably been discriminated against that you cannot find. How do you make them whole if you cannot find them?

The only way you can really make them whole is to make sure that that does not happen to those coming behind them.

Commissioner SILBERMAN. Congressman, we have not suffered from lack of business.

Mr. MARTINEZ. Have not suffered from lack of business?

Commissioner SILBERMAN. We have suffered no lack of business. The EEOC has——

Mr. MARTINEZ. That is not the point.

Commissioner SILBERMAN. There are charging parties that have come to us and said, "We are discriminated against, and we need to"——

Mr. MARTINEZ. Oh, you will find a lot of cases of people that will. What I am talking about is all of those situations where the only way you will ever eradicate it is to eliminate the discrimination itself.

Commissioner SILBERMAN. Oh, and I agree that we should go forward vigorously to eliminate patterns and practices of——

Mr. MARTINEZ. Absolutely, and the only way that you will be able to do that is to pursue both aspects of it, not just making individuals who file those complaints whole.

Commissioner SILBERMAN. Well, I guess on that we have to disagree.

Mr. MARTINEZ. Well, you cannot find them. How can you find them to make them whole if they are not there? Do you know a way or do you envision a way that you can go out and find them?

Commissioner SILBERMAN. I guess if they are not there, then——

Mr. MARTINEZ. A history of 40 years of discrimination, where are you going to find those people?

Commissioner WEBB. Chairman Martinez, I think if you look at other aspects of the law, the ideal would be to find everybody who has been victimized and to give them what they would have had but for the discrimination.

Mr. MARTINEZ. That would be ideal, but you cannot.

Commissioner WEBB. That is absolutely right. I think not unlike a case of products liability where somebody is hurt and you cannot find them, you do not say, "We will go out and make *x* consumer beneficiary to something even though they suffered no harm." What you do is you say to the manufacturer, "you will stop that practice. You will not do it again. You will look at, as we do now, those practices in the personnel decisionmaking process that impacts minorities and women." Make them change their practices and make their employees aware.

You would be surprised what happens when we file suit, how many people that heretofore had not been found all of a sudden contact us.

Also, I think one of the things we are doing is to make the employees in the particular workforce aware of their rights under the Federal statutes. That also has the benefit of increasing their access to the Commission and their awareness of their protections.

Part of the problem is there are a whole host of people who are not aware of their rights, are not aware that discrimination took place. A lot of it is a close call, as you well know, whether or not a specific employment decision was or was not discriminatory. Oftentimes in systemic programs, which, by the way, we do not simply wait for people to come in; we have all been active in seeking out discrimination and exercising our statutory authority to sign Commissioner's charges, to start investigations that do, in fact, uncover discrimination against large numbers of persons.

When that is found, what we are saying now is we are identifying the people who have been harmed and trying to get them as complete relief as possible, and we are also trying to eliminate the practices of the standards barriers for the legitimate aspiration of people to have a nondiscriminatory work environment.

Mr. **Martinez**. Fine, you know. In the case of a product that is fine because you can stop the manufacture of that product. In the case of human beings where there is discrimination that has existed for a long time, and you tell a person to stop discriminating, you have got to have some method to provide an indication as to whether the discriminatory practices have stopped.

In this particular case, mandating goals and timetables provide that, and indication in many cases, employers voluntarily agree to timetables and goals because if you just say, "Stop doing it," and you make no mandate of that person to eliminate a situation that is totally unfair within a community and within a workforce, that person is not necessarily bound to comply. An employer may even subvert timetables and goals.

Commissioner **Webb**. I think that we are confusing a couple of things. No. one, I do not think any of us in our testimony have said that we are against statistical measures as an indixes of discrimination. We all believe that you can draw appropriate inferences from statistics, and that is a way to monitor.

I think another way to monitor is a way that I favor: looking at the actual employment decisions that are made and making a value judgment about whether they are nondiscriminatory or not, and being prepared to go into court to seek the power of the court through contempt proceedings to make sure that the discrimination has, in fact, stopped.

If what we are talking about is whether there is an obligation to make up to the group for the historical discrimination that may have happened. I do not believe that is what title VII is intended for. It is not a reparations act.

Mr. **Martinez**. No, it is not a reparations act, but it surely is an act that was intended to remedy by making sure that one progresses from the point of nonparticipation to participation, and that is the key.

Let me ask each one of you individually this, and each one can answer in turn.

Do you believe that the acting general counsel may unilaterally decide not to seek the enforcement of existing consent decrees which contain goals and timetables without informing the parties involved or asking courts to revise those decrees?

With regard to the last part of this question, asking the Court to revise those decrees, can he do it? I will start with you.

Commissioner **Alvarez**. I think if it is pursuant to Commission policy, he can seek the revision of any consent decree that we are a party to.

Commissioner **Gallegos**. I do not think the general counsel makes policy. I think the Commission makes policy. So if the Commission made that policy, so be it.

Commissioner **Webb**. That has not happened here. However, I think the general counsel, under the procedures we have, brings to this Commission authorization to go in and enforce our agreement.

I also think that it is a situation that I cannot envision happening with this general counsel.

Mr. MARTINEZ. Ms. Silberman.

Commissioner SILBERMAN. I would agree with that assessment. I cannot honestly tell you whether or not it can be done under the law. I have not looked at it and have not been advised on it. My general counsel tells me it has not been done, and it would seem to me that that would not be something that Mr. Butler would do.

Mr. MARTINEZ. I think if we go any further we are beating a dead horse.

I close by thanking you for your appearance here, for giving us testimony today, and by making a statement that I do not believe that the EEOC can be effective if it cuts out all prospective relief. I urge the Commission to debate and determine a policy that they want to follow, and not being a one man, one rule policy.

Thank you.

Mr. Clifford Alexander.

Mr. Alexander, I wish to welcome you here, and let's just wait a few minutes.

[Pause in proceedings.]

Mr. MARTINEZ. If you would help us facilitate the committee hearing by moving quickly outside and closing the door.

All right, Mr. Alexander. Why don't you proceed.

STATEMENT OF CLIFFORD ALEXANDER, ESQ., ALEXANDER & ASSOCIATES

Mr. ALEXANDER. Thank you very much, Chairman Martinez.

It is a privilege to be here before your committee today.

The Reagan Equal Employment Opportunity Commission rather than fostering accuracy in the discussion of goals and timetables has chosen to mislead the American public. This was further outlined in the testimony we have just heard.

The Reagan-chosen leadership of the Commission has intentionally misrepresented the reason for affirmative action. It has pandered to the emotions by asserting that goals and timetables get women and minorities jobs they cannot perform. Nothing could be further from the truth, and Meese, Reynolds, and Thomas know it.

An affirmative action plan is a management tool. Its purpose is to enable employers to better identify, employ and promote women and minorities. Goals and timetables are used only after availability and utilization analyses have taken place.

If women or minorities have not been employed in some reasonable relationship to their skills and availability where the employer recruits, then and only then goals are set. As with any other important management objective, the goals are to be achieved within a specific timeframe.

Do not believe Thomas, Reynolds, or Meese when they tell you that goals and timetables lead to the employment of unqualified women and minorities. They are doing human beings a disservice when they repeat it before this committee and in the public. They diminish millions upon millions of human beings, and they know better.

When they say this, they make a mockery of title VII of the Civil Rights Act of 1964, which I helped draft. The Congress passed the Civil Rights Act of 1964, and President Lyndon Johnson signed it. If the Attorney General or the Chairman of the EEOC does not like the law, then let them come here to the Congress and ask—I say "ask"—that you wipe it off the books.

In the meantime, like it or not, they swore to uphold the laws of this country. This crowd looks upon equal employment opportunity as a slogan, but they do not want the slogan to become a fact. You do no eradicate the bias in the workforce by saying it should not be there, as we have heard today.

If it were that easy, the problem would have been solved a long time ago. Bigots still smile in the face of their victims. When the evidence exposes their backwardness, you do not just wish it away. The damage then has been done.

One must have lawful systems that can measure progress. Goals and timetables are tools for fairness in the world of work.

There are certain legislative changes that I would suggest to this committee, Mr. Chairman. The most important change in title IX would be to give the EEOC the power to issue cease and desist orders. With this power, complaints would be handled more expeditiously. This change would save businesses money, unclog court calendars, and most importantly, and it seems to me this is where Meese, Thomas, Reynolds, and Reagan really miss the boat, most importantly, give faster remedies to victims of discrimination. After all, this is what title VII is all about, as you have so eloquently pointed out earlier in this hearing: the people involved that are to be protected.

It is a much needed change, and I would suggest to you that all of this smokescreen about goals and timetables is perhaps a device chosen by this administration to avoid giving real opportunity to women and minorities.

Thank you.

Mr. **Martinez**. Thank you, Mr. Alexander.

I have to agree with you that part of this is a smokescreen. It is a smokescreen, and I think, in my humble opinion, the Commission has been made dupes for, and that is to deny people the rights, to deny people the opportunity to even seek redress to discrimination.

I am interested in your cease and desist order and that change because it was alluded to by one of the Commissioners—I believe it was Mr. Webb—that they needed something like that as a tool. It would be more effective and work faster. So he shares that opinion with you.

Explain to me a little bit how you envision the cease and desist order would work.

Mr. **Alexander**. Certainly, sir.

When the Equal Employment Opportunity Commission was originally structured with five members, it was ordered on the way the National Labor Relations Board was set up. The purpose then before they took power, there was a cease and desist section in the original law, but it was taken out by the Senate.

The reason it was structured with five Commissioners was that you could have cases brought to the Commission, handled by expert hearing examiners. An order could be issued very quickly, and then that order could eradicate the problem, either give back pay to the victim or throw it out if it was meant to be thrown out or promote the individual.

The experience at the time showed that in 96 percent of the instances at the NLRB, all you had to do was issue the final decision and the order, and that was it. You did not then have to worry about going into court.

What has now happened with title VII, it is a relief act for the attorneys of this world who do that work. I think more money goes to attorneys than goes to victims unhappily.

The way it should work is that individuals get a quick answer to their claims of discrimination. Again, I know the focus of this hearing is on legislative changes. This could be a very significant legislative change. Businesses ought to back it, and those who are charged with discrimination, because there is a quicker resolution of the problem before them.

The individual who works for them, rather than being in a setting where he or she has charged something has happened, has to sit there for 2, 3, 4, or 5 years, waiting for something to go through the administrative process, go to a court, and then maybe get settled, will have it settled far more quickly if, indeed, you had hearing examiners at a commission ordered to do that with a specific time limit as to when they should issue that with, of course, the right of appeal to the court, but instead of all of these cases, back and forth, back and forth, the rights of individuals and the rights of corporations, of course, as well would be better handled and more efficiently handled.

The way it works today is it seems to me, listening to the leadership of this Commission, they are engaged in debates on the head of a pin. They are talking about goals and timetables, and they do not talk to you about, unhappily, what an affirmative action plan's history really is.

The real reason that we initially had affirmative action plans was to see to it that the society that had ignored the rich talent of women, blacks, Hispanics, Asians, others in the society who had been left out of the job market, that the affirmative action plan caused the businesses and the labor unions that were involved in the hiring and in the promotion to go and look at those people, not to bring in people who were not qualified, as they would lead you to believe.

Affirmative action plans cause, after you have analyzed and found that there is a supply of qualified people, cause an employer to go and look at that supply when it has ignored that supply today, and that is the key part of why you have goals and timetables.

At one time, sir, I was Secretary of the Army. It would be an absurdity in that position for me not to have touted the number of soldiers that we had under our jurisdiction. It would have been an absurdity for me not to know that our budget was $40.2 billion. You deal in numbers in order to assess how you are going.

For people to say when it comes to the world of work, we are going to do it on a smile and a handshake, is to say that they are not serious and that they are not serious about this. This is the most important thing that this country and society could consider itself now, today, thinking about because what do we do most of our lives? We work, and when we deny people the opportunity to work, when a Chicano or a black person graduates from college in this society today and earns less than a white person or an Anglo, and that is the fact today, then you know discrimination is in the act.

When women earn $63 to every white male $100, we know that there is discrimination at work. We have to have the mechanisms to try and rectify this, and that is more important than anything else we ought to be doing.

Now, if you do not count numbers, you do not know the extent of the problem.

Mr. MARTINEZ. I think you are absolutely right, and that leads me to another question I would like to ask you. It seems to permeate the Commission as it exists now or at least be the majority rule, and I do not know if I should say majority rule. If you say the majority vote rules, that is majority rule.

But that perception is that title VII gives only remedies to specifically identifiable victims, and I think this is the smokescreen that is being used by the administration today, to really cover up the fact that they do not want to eliminate mass discrimination. They really do not want to do that, and they can stop it or slow it down by going after identifiable victims and saying this is the only way you really eradicate discrimination.

That may handle an individual case, but if you consider the numbers out there that really have to be addressed, it is like putting a drop of water in the bucket.

So I would like to ask you this question. Do you believe that title VII, as it was written, only remedies identifiable victims of discrimination?

Mr. ALEXANDER. Listening to that discussion, Mr. Chairman, it is patently absurd what some people said up here. The general counsel of the Commission, the head of the Commission, and then for one of the Commissioners to invoke the name of my dear friend, Hubert Humphrey, for that proposition is an absurdity and really a disgrace.

The fact is that there are pattern or practice cases that are called for under the Commission's regulations. It also is very, very clear that you do not specifically see anywhere in the statute, nor in the intent, that there should not be goals and timetables in decisions and conclusionary decisions after cases have been investigated.

Now, it has also been made quite clear in Executive Orders 11246 and 11375 that goals and timetables by the order of the President of the United States, Lyndon Johnson, and later on by the Nixon administration and later on by the Ford and on and on and on, that goals and timetables are the kinds of measurements that companies who do business with the Federal Government must employ.

So to say that the Equal Employment Opportunity Commission, when it reaches an agreement with somebody, should not use numbers is to misconstrue title VII, to misconstrue the executive order, to misconstrue what the Supreme Court has said, to take one case specifically that had to do only with seniority and try and torture it to death.

I think, however, sir, there is a much more venal motivation on the part of Meese and Reynolds and these folks. Their motivation is to keep their feet on the necks of women and on the necks of minorities in this society. The purpose of all of this talk and all of this discussion continues to be to keep the downtrodden down. It is to continue to keep the privileged in a position of privilege in this society. It is continually to play to and pander to the emotions of the have-nots. It is the same thing that used to happen in the South when the poor whites would be pitted against the blacks in the South because neither of them had a damned thing, but they were supposed to fight it out.

Now, they are trying to get the minorities to fight it out, the women to fight with the minorities and worry about whether any of us are qualified to hold the jobs that we have got. Nothing could be further from the truth.

If this administration were the least bit interested in equal employment opportunity, could it have only found two black people in all of America to make judges in this entire time that this man has been President? Are there no other people that could do this job?

Of course, they have no real feeling for the people that they should be protecting. Now, they do not have to be advocates, but they do have to, fortunately, because you all are here, fulfill the obligations of the Congress.

I think this law ought to be toughened with cease and desist orders. I think the people should be called to task every minute they do not carry out the laws they are supposed to, and it is the most important public debate that is underway today, and it is not just a question of goals and timetables. It is a question of what is the purpose of this President and this administration in giving equity to men and women in the world of work, and nothing could be more fundamental to this society.

Mr. MARTINEZ. We make beautiful speeches about equity to those people, but really it does not carry forth in the acts that they commit.

Let me ask you this. What effects and impact will this debate have on civil rights enforcement and on employers, too?

Mr. ALEXANDER. Well, the effect is the ripple effect that is now becoming almost a tide of feeling that is going out to employers today, and the feeling and the word is that you do not have to worry about equal employment today because if you listen to Reynolds, if you listen to Meese, if you listen to Butler, if you listen to Thomas, the clear message is: we are going to back off. Do not worry. We will take care of you. You keep on your subtle ways.

The only kind of discrimination they seem to want to handle is if somebody looks somebody in the face and calls him or her a derrogatory name. That is the only kind they want to identify.

The fact of it is that if you look in the top Fortune 500 today and in the top 10 jobs of all of those companies, there is not a black or Chicano among them. Now, do you think that is an accident? It is a fact of discrimination in the American work place.

Can it be solved? Of course, it can be solved, if people of goodwill are willing to work at it.

If the message comes from the United States Government that you can keep on discriminating and you do not have to worry about numbers, that message is going to be clearly carried out in the work place.

If I might give just one example of President Lyndon Johnson, in a meeting with the only black person in the room who was myself, there were CEOs from several of the major corporations, and he was talking in the east wing of the White House, and he was saying these same kinds of things, that you have an obligation as heads of corporations in America to see that there is fairness to women and to minorities.

It was the white leadership of the Nation talking to the business white leadership of the nation about solving the problem. It seems to me that what they have now is tried to create in the society an argument between blacks and blacks and women and women and Hispanics and Hispanics about what method might or might not solve the problem.

The problem's solution lies in the predominantly white political and economic leadership of this Nation, and it can give a clear direction in equal employment. The direct is that if you discriminate against somebody, you are just as well stealing money out of their pocket. It is the same darn thing. You take my wallet from me on the street. You do the same thing to me if you pay me less money though I am trained to do a skilled job.

Now, if that kind of behavior continues, then the victims out here are now put in the position under this administration of arguing with each other about goals and timetables. They parade before you minorities and women to make their arguments. That has been done throughout the history of this nation.

Fortunately or unfortunately, I guess, opinions come in all shades on national minorities and both sexes. The fact is that the Government of the United States has passed title VII. The fact is that despite this President, and happily, Executive Orders 11246 and 375 are today the law of the land. Now, anybody who reads those knows that goals and timetables are in order, and anybody who takes his or her mission seriously should see to it they are utilized again, not to bring somebody who is not qualified in, as some of them would imply to you, but to give those who have not had the opportunity to be there.

If you live in an all white neighborhood and you go to an all white church and you went to school with all white people, then when you look in your circle of friends to go and employ somebody, where are you looking? In those areas.

So affirmative action plans were set up for the various groups that are affected so that the society would look to the rich source of talent that it had segregated out in the past, and indeed, in some places it has worked. In other places it has not. It is not the be all and end all.

If we had a courageous President who would stand before America and speak with the same devotion about discrimination as he does about some other things, we might solve this problem. I guess the chief executive officers actually of this country have come forward to the Congress and said, "Do not change those Executive orders."

Many of you and your colleagues have certainly written to this President saying the same thing. The Senate has done the same thing. The only people who seem to have their ears clogged are the people in charge of enforcing it at the Equal Employment Opportunity Commission, Bradford, Reynolds and Ed Meese.

The Justice Department is a misnomer. It has nothing to do with justice when they do this.

Mr. **Martinez**. I have to agree with you. Along those same lines, I asked Mr. Butler if he thought because he disagreed with the law that he should not enforce it, and I think he stated that no, he would enforce the law even if he disagreed with it, although that has not been his action.

I would ask you: Do you believe that a person who disagrees with the law should stop enforcing it?

Mr. **Alexander**. Chairman Martinez, we do live in a world of laws. The national laws emanate from a body of elected people. Unlike all of us who have been before you, you really do come from the people. People voted for you and put you there.

When you have a system that says that laws come from a duly constituted legislative body and are signed by Presidents, those of us who used to raise their hands and swear to uphold it and those who presently do have an obligation to fulfill what you are doing or step down.

There really is no grey area in this, and to hear the people that testified, who say, "On the one hand, I am not sure what I would do," and, "On the other hand, I do not know what I believe," and refuse to say what they said to a member of the Commission. What is this? Are we running a Government in secret, in camera, here where Commissioners talk to general counsels about the public business?

This is the public business. Discrimination could not be any more than the public business. That title VII Commission is set up to hear discrimination complaints. It is set up to handle patterns and practices cases. They seem to be unable to state an opinion. They treat the legislative branch with a kind of offhand contempt that is not consistent with what ought to be done.

I have testified many times, and have been beaten over the head and shoulders when I have been in Government, and had my discussions with Members of Congress, but I think the purpose of being before the legislative body is to have an opportunity to answer questions, and then those questions are asked: if you have an obligation under the law, be sure that you carry out that obligation.

Mr. **Martinez**. Mr. Alexander, we are being joined by Steve Gunderson, the ranking minority member of the committee.

Let me ask you another question that I asked Mr. Thomas regarding his determination to stop enforcing the law until the Supreme Court deliberates or until the Supreme Court finishes its deliberation and makes a ruling. You know, I would love to do that in the case of Gramm-Rudman. The lower court held that it was unconstitutional, or at least that part of the question was unconstitutional, and I would like to abandon the whole thing on the premise that the Supreme Court is going to uphold that appellate court decision. So let's not abide by the law.

Contrary to the notion that Thomas expressed here, we have to abide by the law until the Supreme Court actually changes it. So my question to you: should he stop enforcing it until the Supreme Court makes a decision? The Supreme Court may uphold it or they may negate it. At that time it is changed law, but until that time, it is the law. Should he stop enforcing it?

Mr. ALEXANDER. Well, sir, what I learned in law school was that you do not wait around for the Supreme Court. You look at what the laws are already on the books, and in this instance there has been plenty of interpretation by the circuit courts. There has been plenty of justification for goals and timetables when they are used as part of an agreement, usually after some harm has been found.

I do not think anyone on this committee suggested that just automatically goals and timetables are to be set. I do not think anybody on this committee suggested that the whole work place should be X percent women and Y percent Chicano and Z percent black. That is not the point.

The point of goals and timetables, again, as part of an affirmative action plan, is to see to it that those who have been ignored get a chance to get into the work place, and it has been utilized in numerous instances by courts. It has been utilized by Presidents of both parties and Executive orders and by certainly the EEOC in many of its cases.

Mr. MARTINEZ. In closing, what message do you have for Government officials who have now inherited this agency's mission to enforce employment discrimination laws? I know you have stated it earlier in other ways. Why don't you wrap it up and tell us from your experiences what you feel this Commission should be doing?

Mr. ALEXANDER. Sir, I would say first that there are many, many hundreds, maybe thousands of individuals who work for the Commission. Some of them worked there during my time, who every waking hour of their day struggle to do as fine a job to carry out the law as possible. I do think that the future is really up to the leadership of the Commission and whatever direction they get from their administration.

In fact, the leadership of the Commission ought to see to it that it enforces the law clearly and fairly. Most importantly, the message that you imply perhaps with one of your questions, the message is not getting through to America that there is a remedy if you are discriminated, and the Federal Government, through the Equal Employment Opportunity Commission, holds an opportunity for you to become whole.

The message now is a negative message. It is that people are getting into jobs who have not got the qualifications for those jobs. That is not the message that should come from an agency of the Federal Government established by the Civil Rights Act of 1964.

It was an act that came again by both parties battling it out in the Congress, not what everybody wanted, but it has been carried out with, I think, a fairness and a vigor for the rights of American citizens.

The message that comes through, that I heard today listening to the testimony, is a message of defeat. It is not a message of hope to American citizens.

Now, when you say people are protected, there is one thing that I would say. There is a term that is used nowadays called "reverse discrimination." There is no such thing. There is discrimination.

White men can be discriminated against, and if they have charges of discrimination, they should come forward and receive the same amount of attention and time as a white woman or black male, Hispanic woman, any variety of person. An individual can be discriminated against, and this Commission is there to protect them.

But what is happening now is there is a reversal of the trend. There is a discussion as if a whole body of white males is sitting out there beaten and bruised by the Equal Employment Opportunity Commission, and the rest of the people in the society somehow are on the top of the heap. The economic facts do not really say that to be so.

Mr. MARTINEZ. Thank you, Mr. Alexander.

At this time I will turn to Mr. Gunderson and ask if he has questions, comment or a statement.

Mr. GUNDERSON. No.

Mr. MARTINEZ. Mr. Hayes.

Mr. HAYES. The last of it I heard sounded good.

Mr. MARTINEZ. Mr. Alexander, thank you for coming here today and giving us your views. We appreciate it, and it is an important part of this testimony today. Thank you.

Mr. ALEXANDER. Thank you for the opportunity.

Mr. MARTINEZ. We are now adjourned.

[Whereupon, at 11:36 a.m., the subcommittee was adjourned, subject to the call of the Chair.]

[Additional material submitted for the record follows:]

Prepared Statement of Clifford L. Alexander

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, IT IS A PRIVILEGE TO APPEAR BEFORE YOU TODAY.

THE REAGAN EQUAL EMPLOYMENT OPPORTUNITY COMMISSION RATHER THAN FOSTERING ACCURACY IN THE DISCUSSION OF GOALS AND TIMETABLES, HAS CHOSEN TO MISLEAD THE AMERICAN PUBLIC. THE REAGAN CHOSEN LEADERSHIP OF THE COMMISSION HAS INTENTIONALLY MISREPRESENTED THE REASON FOR AFFIRMATIVE ACTION. IT HAS PANDERED TO THE EMOTIONS BY ASSERTING THAT GOALS AND TIMETABLES GET WOMEN AND MINORITIES JOBS THEY CANNOT PERFORM. NOTHING COULD BE FURTHER FROM THE TRUTH, AND MEESE, REYNOLDS AND THOMAS KNOW IT.

AN AFFIRMATIVE ACTION PLAN IS A MANAGEMENT TOOL. ITS PURPOSE IS TO ENABLE EMPLOYERS TO BETTER IDENTIFY, EMPLOY AND PROMOTE WOMEN AND MINORITIES. GOALS AND TIMETABLES ARE USED ONLY AFTER AVAILABILITY AND UTILIZATION ANALYSES HAVE TAKEN PLACE. IF WOMEN OR MINORITIES HAVE NOT BEEN EMPLOYED IN SOME REASONABLE RELATIONSHIP TO THEIR SKILLS AND AVAILABILITY WHERE THE EMPLOYER RECRUITS, THEN GOALS ARE SET. AS WITH ANY OTHER IMPORTANT MANAGEMENT OBJECTIVE, THE GOALS ARE TO BE ACHIEVED WITHIN A SPECIFIC TIME FRAME.

DON'T BELIEVE THOMAS, REYNOLDS OR MEESE WHEN THEY TELL YOU THAT GOALS AND TIMETABLES LEAD TO THE EMPLOYMENT OF UNQUALIFIED WOMEN AND MINORITIES. WHEN THEY SAY THIS, THEY MAKE A MOCKERY

OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964. THE CONGRESS PASSED THE CIVIL RIGHTS ACT OF 1964 AND PRESIDENT LYNDON JOHNSON SIGNED IT. IF THE ATTORNEY GENERAL OR THE CHAIRMAN OF THE EEOC DON'T LIKE THE LAW, THEN LET THEM GO TO THE CONGRESS AND ASK THAT IT BE WIPED OFF THE BOOKS. IN THE MEANTIME, LIKE IT OR NOT, THEY SWORE TO UPHOLD THE LAWS OF THIS COUNTRY.

THIS CROWD LOOKS UPON EQUAL EMPLOYMENT OPPORTUNITY AS A SLOGAN -- BUT THEY DO NOT WANT THE SLOGAN TO BECOME A FACT. YOU DO NOT ERADICATE THE BIAS IN THE WORKPLACE BY SAYING IT SHOULD NOT BE THERE. IF IT WERE THAT EASY, THE PROBLEM WOULD HAVE BEEN SOLVED A LONG TIME AGO. BIGOTS STILL SMILE IN THE FACES OF THEIR VICTIMS. WHEN THE EVIDENCE EXPOSES THEIR BACKWARDNESS, YOU DO NOT JUST "WISH AWAY" THE DAMAGE THEY HAVE DONE. ONE MUST HAVE LAWFUL SYSTEMS THAT CAN MEASURE PROGRESS. GOALS AND TIMETABLES ARE TOOLS FOR FAIRNESS IN THE WORLD OF WORK.

THERE ARE CERTAIN LEGISLATIVE CHANGES THAT I WOULD SUGGEST TO THIS COMMITTEE. THE MOST IMPORTANT CHANGE IN TITLE VII WOULD BE TO GIVE THE EEOC THE POWER TO ISSUE CEASE AND DESIST ORDERS. WITH THIS POWER COMPLAINTS WOULD BE HANDLED MORE EXPEDITIOUSLY. THIS CHANGE WOULD SAVE BUSINESSES MONEY, UNCLOG COURT CALENDARS, AND MOST IMPORTANTLY, GIVE FASTER REMEDIES TO VICTIMS OF EMPLOYMENT DISCRIMINATION. IT IS A MUCH NEEDED CHANGE.

(Clifford L. Alexander was Chairman of the Equal Employment Opportunity Commission from 1967 until 1969. He was a chief White House advisor on Civil Rights to President Lyndon B. Johnson from 1964-1967. He was Secretary of the Army from 1977 until 1981. Since 1981, Mr. Alexander has been President of Alexander & Associates, Inc., a corporate consulting firm at 400 C Street, N.E., Washington, D.E. 20002. (202)546-0111)

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EEOC ANNOUNCES RECORD-BREAKING FIRST QUARTER IN ENFORCEMENT OF EQUAL EMPLOYMENT OPPORTUNITY STATUTES

WASHINGTON -- The U.S. Equal Employment Opportunity Commission filed more lawsuits on behalf of job discrimination claimants during the first quarter of 1986 than in any other first quarter in the agency's 20-year history.

"This EEOC is enforcing civil rights laws vigorously, and our record-breaking litigation figures prove it," Chairman Clarence Thomas said. EEOC filed 98 lawsuits during the period, surpassing the previous record of 85 suits filed in fiscal year 1981.

"The dramatic increase in EEOC litigation activity is a direct result of the enforcement policy adopted by this Commission in September 1984," Thomas said. "Certainty and predictability are the hallmarks of that policy. Every time a charge is brought, cause is found and conciliation fails, the case is submitted to the Commission for litigation consideration."

Of lawsuits filed between Oct. 1 and Dec. 31, 1985 on the merits of discrimination claims, 58 were under Title VII of the Civil Rights Act of 1964, 30 under the Age Discrimination in Employment Act and 10 under the Equal Pay Act. The Commission also filed 18 investigative subpoena enforcement actions for an all-time high of 116 first quarter legal actions. In fiscal year 1981, 16 subpoena enforcements brought the total to a previous record of 101.

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Class action cases accounted for 42 of the lawsuits filed (17 under Title VII, 20 under ADEA and 5 under EPA).

"These figures are particularly impressive since traditionally the fewest cases have been filed during the first quarter of the fiscal year," Thomas noted.

The large number of first-quarter legal actions indicates potential for the most productive year yet for Commission litigation. This new record follows a substantial increase in litigation activity during the previous fiscal year in which EEOC filed 411 court actions, a number exceeded only once in Commission history during a 12-month fiscal year.

EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex or national origin; the Age Discrimination in Employment Act; the Equal Pay Act; and, in the federal sector only, prohibitions against discrimination because of handicap.

NOTE: A summary of each lawsuit filed during the first quarter of fiscal year 1986 is included.

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The following is a brief summary of complaint allegations in the 97 substantive lawsuits filed by the Commission in the First Quarter of Fiscal Year 1986 (October 1 - December 31, 1985):

Waterfront Commission of New York Harbor, et al. (ADEA-class)
S.D. N.Y., No. 85-CIV-7732-KTD, filed Oct. 1, 1985, New York DO.
Make-whole relief sought for persons aggrieved by a former policy of denying "pier guard" licenses to applicants age 50 or older.

County of Orange, et al. (ADEA-class)
C.D. Cal., No. 85-6463-CBM, filed Oct. 2, 1985, Los Angeles DO.
Challenge to state law barring newly hired public-safety employees over age 35 from participating in a "Safety Member" pension plan.

Massachusetts Department of Mental Health, et al. (ADEA-class)
D. Mass., No. 85-3701-S, filed Oct. 2, 1985, New York DO.
Challenge to state law requiring employees working at hospitals for mental illness to retire upon attaining age 65.

Massachusetts Capitol Police, et al. (ADEA-class)
D. Mass., No. 85-3702-S, filed Oct. 2, 1985, New York DO.
Challenge to state law requiring certain police officers to retire upon attaining age 65.

Cadre Corporation (Title VII-national origin/retaliation-individual)
N.D. Ga., No. C85-4127A, filed Oct. 3, 1985, Atlanta DO.
Immigrant welder from India paid less than other employees, because of his national origin, and then fired after complaining about the wage disparity.

State of California, Department of Education (Equal Pay Act-individual)
E.D. Cal., No. 85-1431-LKK, filed Oct. 4, 1985, San Francisco DO.
Female "Education Administrative Consultant" paid less than a male "Education Administrator" performing substantially equal work.

Cleveland Range Co. (ADEA-individual)
N.D. Ohio, No. C85-2968, filed Oct. 4, 1985, Cleveland DO.
Administrative employee harassed, suspended and ultimately fired, because of her age (64) and because she had earlier filed an ADEA charge.

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Industrial Parts Depot, Inc. (ADEA-class)
S.D. Ohio, No. C1-85-1634, filed Oct. 4, 1985, Cleveland DO.
Four employees (aged 52-62) laid off due to alleged lack of work, while less experienced persons were retained (ages 22, 26) and hired (ages 25, 26) to perform the same work.

Pantry Pride Enterprises, Inc. (Title VII-race-individual)
E.D. Va., No. 85-163-NN, filed Oct. 4, 1985, Baltimore DO.
Black employee denied promotion to manager's job on two occasions in favor of less experienced white employees.

Bayfront Hotel Corp. (Title VII-race-individual)
M.D. Fla., No. 85-1634, filed October 11, 1985, Miami DO.
Black employee fired from banquet manager position due to alleged cut back, but quickly replaced by a white employee.

Pre-Empt Computer Distributors, Inc. (Title VII-race-individual)
N.D. Ga., No. C85-4192A, filed Oct. 15, 1985, Atlanta DO.
Failure to promote black employee to accounting position, in favor of promoting a less experienced white employee.

Golden Gate Petroleum Corp. (Title VII-sex-class)
N.D. Cal., No. 85-7522-WWS, filed Oct. 17, 1985, San Francisco DO.
Disability benefits denied for pregnancy-related conditions, but provided for non-pregnancy-related temporary disabilities.

Elmwood Village (Title VII-retaliation-individual)
E.D. Pa., No. 85-4792, filed Oct. 18, 1985, Philadelphia DO.
White maintenance employee fired in retaliation for defending the employment rights of black maintenance workers.

General Refractories Co. (ADEA-class)
C.D. Cal., No. 85-6841-CBM, filed Oct. 18, 1985, Los Angeles DO.
Two "Senior Research Engineers," both age 62, terminated due to an alleged cutback shortly before a 26-year-old "Research Engineer" was hired to do the same work.

Terrell Machine Co. (ADEA-class)
W.D. N.C., No. C-C-85-591-M, filed Oct. 18, 1985, Charlotte DO.
Statistical and anecdotal evidence showing that machinists age 50 and older were intentionally selected for layoff is disproportionate numbers.

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United Technologies Co. (Equal Pay Act & Title VII-retaliation-individual)
E.D. Mo., No. 85-2499-C-3, filed Oct. 18, 1985, St. Louis DO.
Female compensation analyst discharged in retaliation for having complained to management about unequal pay and sexual harassment.

City of Atlanta (ADEA-class)
N.D. Ga., No. C85-4245A, filed Oct. 21, 1985, Atlanta DO.
Challenge to policies of refusing to consider persons over age 35 for employment as police officers or firefighters, and requiring all such employees to retire at age 65.

One Bratenahl Place Condominium Ass'n (Title VII-sex-individual)
N.D. Ohio, No. C85-3146, filed Oct. 21, 1985, Cleveland DO.
Security guard sexually harassed by her supervisor and constructively discharged due to continuing harassment.

Lance, Inc. (ADEA-individual)
N.D. Ohio, No. C85-3192, filed Oct. 23, 1985, Cleveland DO.
Refusal to hire fully qualified applicant, age 60, as an outside sales employee for overt age discriminatory reasons and even though he had previously performed the work as an indepedent contractor.

North Olmstead Board of Education (Equal Pay Act-class)
N.D. Ohio, No. C85-3194, filed Oct. 23, 1985, Cleveland DO.
Female "cleaners" paid less than male "custodians" performing substantially equal work.

Ardac, Inc. (ADEA-retaliation-individual)
N.D. Ohio, No. C85-3195, filed Oct. 23, 1985, Cleveland DO.
Employee fired in retaliation for having filed an earlier ADEA charge concerning the denial of a promotion.

Mel-Cummings-Glenn Tavern, Inc. (Title VII-sex-individual)
C.D. Cal., No. 85-6933-WMB, filed Oct. 23, 1985, Los Angeles DO.
Hostess fired for overt sex discriminatory reasons after notifying her employer that she was pregnant.

Mutual Trust Bank (Equal Pay Act & Title VII-class)
S.D. Ind., No. NA85-361C, filed Oct. 24, 1985, Indianapolis DO.
Female loan collectors and branch managers paid less than males in the same positions performing substantially equal work.

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Standby Screw Machine Products Co. (Title VII-sex-individual)
N.D. Ohio, No. C85-3231, filed Oct. 25, 1985, Cleveland DO.
Employee subjected to sexual harassment by her supervisor and discharged after complaining to management.

City of Colorado Springs (Equal Pay Act-class)
D. Colo., No. 85-M-2339, filed Oct. 28, 1985, Denver DO.
Non-uniformed female police dispatchers paid less than uniformed male dispatchers performing substantially equal work.

Duckwall-Alco Stores, Inc. (Title VII-race-class)
S.D. Miss., No. S85-1304(N), filed Oct. 30, 1985, Birmingham DO.
Four black employees fired from clerk/cashier jobs for allegedly violating theft rule, while similarly situated white employees were not discharged for the same alleged offense.

North Carolina Department of Crime Control and Public Safety, et al. (ADEA-class)
E.D. N.C., No. 85-1471-CIV-5, filed Oct. 30, 1985, Charlotte DO.
Continuing refusal to hire persons age 35 or older for employment as "Alcohol Law Enforcement Officers," despite supposedly having dropped its hiring age policy.

The 67 Liquor Shop, Inc. (Equal Pay Act & Title VII-individual)
S.D. Fla., No. 85-5838, filed Oct. 30, 1985, Miami DO.
Female deli clerk paid less than males performing substantially equal work, and fired after complaining about the unequal pay.

McGee Women's Hospital (ADEA-class)
W.D. Pa., No. 85-2617, filed Oct. 31, 1985, Philadelphia DO.
Two 61-year-old administrative employees discharged during a reorganization and immediately replaced by a newly hired 32-year-old.

St. Joseph's Hospital (Title VII-sex-class)
D. Minn., No. 3-85-1747, filed Oct. 31, 1985, Milwaukee DO.
Two male nurses denied consideration for promotion to the position of Head Nurse for overt sex-discriminatory reasons.

ITT Autowize, Inc. (Title VII-sex/retaliation-individual)
E.D. Ky., No. 85-475, filed Nov. 2, 1985, Indianapolis DO.
Employee denied promotion because of her sex and then fired after complaining about the alleged sex-based promotion denial.

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Shasta Inn, Inc. & Thomas A. Roach (Title VII-sex-individual)
E.D. Cal., No. S-85-1529-EJG, filed Nov. 4, 1985, San Francisco DO. Cocktail waitress fired by lounge manager shortly after she informed him that she was pregnant.

San Francisco Newspaper Printing Co. (Title VII-race-individual)
N.D. Cal., No. 85-8050-JPV, filed Nov. 4, 1985, San Francisco DO. Black employee constructively discharged, because his supervisors tolerated a pattern of racially motivated harassment and intimidation on the job.

Zonta International (ADEA-individual)
N.D. Ill., No. 85-C-9287, filed Nov. 4, 1985, Chicago DO. Executive Director demoted because she refused to retire at age 65, and then fired because she filed an ADEA charge.

Unicare Health Centers (Title VII-race-individual)
N.D. Miss., No. EC85-444SD, filed Nov. 5, 1985, Birmingham DO. Black resident living aide discharged for alleged violation of a workrule, although a White employee was not discharged for violating the same workrule.

General Telephone Company of Ohio (Title VII-sex-class)
S.D. Ohio, No. C2-85-1772, filed Nov. 7, 1985, Cleveland DO. Challenge to policy of subjecting only pregnancy-related disability conditions to screening by a company-employed consultant.

Greyhound Lines, Inc. (ADEA-class)
S.D. Ind., No. IP85-1642C, filed Nov. 7, 1985, Indianapolis DO. Challenge to policy of refusing to consider any applicant age 35 or older for employment as an inter-city bus driver.

Tree of Life Christian School (Equal Pay Act-class)
S.D. Ohio, No. C2-85-1771, filed Nov. 7, 1985, Cleveland DO. Male employees paid a "Head of Household" allowance which is not paid to similarly situated female employees.

Fairview Community Hospitals (ADEA/Title VII-retaliation-individual)
D. Minn., No. 4-85-1525, filed Nov. 8, 1985, Milwaukee DO. Retaliatory acts against a part-time psychiatric technician, culminating in the refusal to call her in for any work, because she had earlier filed an ADEA/Title VII-sex discrimination charge.

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ABC Rental (Title VII-sex-class)
N.D. Tex., No. C3-85-2232R, filed Nov. 12, 1985, Dallas DO.
Temporary injunction obtained to prohibit a pattern-and-practice of sexual harassment and retaliation against female employees.

Citizens Bank and Trust Company of Maryland (Title VII-race/sex/national origin-class)
D. Md., No. M-85-4607, filed Nov. 12, 1985, Baltimore DO.
Systemic pattern-and-practice case involving race, sex and national origin discrimination in recruitment, hiring, inital assignment and job segregation.

Collier Cobb and Associates (Equal Pay Act-individual)
M.D. N.C., No. C85-1242D, filed Nov. 12, 1985, Charlotte DO.
Female junior accounts executive paid less than male performing the same job, and fired for protesting the unequal pay for equal work.

Hillsborough County Aviation Authority (ADEA-class)
M.D. Fla., No. 85-1777-CIV-T-17, filed Nov. 12, 1985, Miami DO.
Anectodal and statistical evidence showing a policy of not hiring applicants over age 40 as tour guides at the Tampa Int'l Airport.

Howard Johnson Motor Lodges (Title VII-retaliation-class)
E.D. N.C., No. 85-1498-CIV, filed Nov. 12, 1985, Charlotte DO.
Temporary injunction to restrain threats against employees who cooperated in an EEOC investigation of a sexual harassment charge.

Panduit Corp. (Title VII-race/sex/national origin-class)
N.D. Ill., No. 85-C-9535, filed Nov. 12, 1985, Chicago DO.
Systemic pattern-and-practice case involving race, sex and national origin (Hispanic) discrimination in hiring for factory and office positions.

Peterson, Howell & Heather, and PHH Group (Title VII-race/sex-class)
D. Md., No. B-85-4608, filed Nov. 12, 1985, Baltimore DO.
Systemic pattern-and-practice case involving race and sex discrimination in recruitment, hiring, assignment, classification and wages.

Gunsport Centers (Title VII-religion-individual)
D. Ariz., No. 85-2503-PHX-EHC, filed Nov. 13, 1985, Phoenix DO.
Employee constructively discharged because of employer's refusal to offer any religious accomodation for his sabbath observance.

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High School Driver Training (Title VII-sex-individual)
N.D. Ohio, No. C-85-3403, filed Nov. 13, 1985, Cleveland DO. Female employee laid off due to pregancy, while employees are not similarly laid off due to any other disability condition.

One Bratenahl Place Condominium Association (Title VII-retaliation-individual)
N.D. Ohio, No. C-85-3397, filed Nov. 13, 1985, Cleveland DO. Employee fired for stating that he would tell the truth to the EEOC regarding a sexual harassment charge filed by a female co-worker.

Rainbo Baking Co. of Phoenix (Title VII-national origin-individual)
D. Ariz., No. 85-2504-PHX-RCB, filed Nov. 13, 1985, Phoenix DO. Employee discharged by supervisor after being subjected to ethnic epithets based on his national origin (Hispanic).

Liturgical Publications, Inc. (Title VII-sex-individual)
D. Minn., No. 3-85-1854, filed Nov. 14, 1985, Milwaukee DO. Employer refused to reinstate female employee seeking to return from pregnancy disability leave, while reinstating other employees who wanted to return from disability.

Tucson Firefighters Association (Title VII-sex-individual)
D. Arix., No. 85-987-TUC-ACM, filed Nov. 14, 1985, Phoenix D.O. Injunction sought to restrain an on-going pattern of sexual harassment by a male supervisor against a female employee.

Dentsply International, Inc. (Title VII-race-retaliation-individual)
C.D. Cal., No. CV-85-7508-AAH, filed Nov. 15, 1985, Los Angeles DO. Employee discharged after objecting to management about a racially derogatory remark made by the manager.

Disneyland Employees Federal Credit Union (TitleVII-race-individual)
C.D. Cal., No. CV-85-7507-WMB, filed Nov. 15, 1985, Los Angeles DO. Black employee subjected to a pattern of harassment because of race and discharged in retaliation for filing a discrimination charge.

City of Ontario, et al. (ADEA-individual)
C.D. Cal., No. 85-7539-AWT, filed Nov. 18, 1985, Los Angeles DO. Involuntary retirement of a "Police Agent II" at age 60, pursuant to a California statute.

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Drug Emporium (Title VII-sex-individual)
S.D. Ind., No. IP85-1654C, filed Nov. 19, 1985, Indianapolis DO.
Female employee subjected to sexual harassment by supervisor and constructively discharged due to management's failure to take any corrective action.

University of Health Sciences (Title VII-national origin-individual)
W.D. Mo., No. 85-1462-CV-W-9, filed Nov. 19, 1985, St. Louis DO.
Employee who emigrated from India denied a promotion because of her national origin.

Rocky Mountain Airways, Inc. (Title VII-sex-individual)
D. Colo., No. 85-M-2505, filed Nov. 20, 1985, Denver DO.
Female employee discharged from a position as inventory coordinator for overt sex-discriminatory reasons.

Hellman Thermal Systems Corp. (ADEA-settlement-individual)
S.D. Ind., No. IP85-1657C, filed Nov. 20, 1985, Indianapolis DO.
Action to enforce the terms of a no-fault Settlement Agreement under the ADEA, where Charging Party never received the promised benefits.

Carson's The Place for Ribs (Title VII-sex-individual)
D. Arix., No. 85-2555-PHX-PGR, filed Nov. 21, 1985, Phoenix DO.
Female employee subjected to sexual harassment by supervisor and then discharged for complaining to management.

Ryder Truck Rental, Inc. (Title VII-national origin-individual)
E.D. Tex., No. B-85-1579-CA, filed Nov. 21, 1985, Houston DO.
Employee subjected to verbal harassment and undesirable jobs because of his national origin (Hispanic).

Michigan Health Care Corp. & Michigan Osteopathic Center (Title VII-retaliation-class)
E.D. Mich., No. 85-CV-75403DT, filed Nov. 22, 1985, Detroit DO.
Pattern of retaliation against five employees who participated in an EEOC investigation of a sex discrimination charge.

Globe Amerada Glass Co. (Title VII-retaliation-individual)
N.D. Ill., No. 85-C-9891, filed Nov. 25, 1985, Chicago DO.
Temporary injunction to restrain the threatened termination of an employee who had assisted in an EEOC investigation of a former co-worker's sex/pregnancy discrimination charge.

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Universal Ceramics, Inc. (Title VII-retaliation-individual)
N.D. Ga., No. C85-373R, filed Nov. 25, 1985, Atlanta DO.
Employer refused to hire a female applicant, because she had earlier filed a sex discrimination charge against that employer.

Jewish Federation of Metropolitan Chicago (Title VII-religion-individual)
N.D. Ill., No. 85-C-9948, filed Nov. 26, 1985, Chicago DO.
Employee discharged from his position as a janitor, because of his religion (Jehovah's Witness).

The Forgotten Woman, Ltd. (Title VII-race-individual)
N.D. Cal., No. 85-8687-CAL, filed Nov. 26, 1985, San Francisco DO.
Employee discharged from her position as a specialty retail store manager after a 5-week training period, because of her race (Black).

O & G Spring and Wire Form Specialty Co. (ADEA/Title VII-race-class)
N.D. Ill., No. 85-C-9966, filed Nov. 27, 1985, Chicago DO.
Anecdotal and statistical evidence showing a pattern-and-practice of not hiring anyone over age 40 or any Blacks for factory worker jobs.

Allis-Chalmers Corp. & United Auto Workers, Local 1319 (ADEA-class)
N.D. Ind., No. S85-0694, filed Nov. 29, 1985, Indianapolis DO.
Challenge to collectively bargained plant-closing agreement, under which severance pay was given to all permanently laid-off employees, with the sole exception of those already eligible to retire.

Bethlehem Mines Corp. (ADEA-class)
S.D. W.Va., No. 2:85-1480, filed Nov. 29, 1985, Philadelphia DO.
Statistical and other inferential evidence showing that retirement eligibility was used as a factor in selecting employees for layoff.

Protek of Albuquerque, Inc. (Title VII-sex/retaliation-individual)
D. N.M., CIV85-1548-JB, filed Nov. 29, 1985, Phoenix DO.
Employee threatened with discharge after notifying her employer that she was pregnant, and fired in retaliation for contacting a state agency about that threat.

C.E. Smith Company (ADEA-individual)
M.D. N.C., No. C-85-1286-G, filed Dec. 2, 1985, Charlotte DO.
Failure to recall a laid-off employee, aged 61, in preference to less experienced and less senior employees, aged 37 and 38.

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ICI Americas (Title VII-sex-individual)
S.D. Ind., No. NA85-378C, filed Dec. 4, 1985, Indianapolis DO.
Employee denied assignment/promotion to a position on the basis of a weight lifting test.

Quadrant Club (ADEA-class)
N.D. Tex., No. CA3-85-2457H, filed Dec. 4, 1985, Houston DO.
Injunctive and make-whole relief sought to correct overt age discriminatory practices involving advertising, hiring, recruitment and recordkeeping (failure to retain employment applications).

Ailing & Cory, Inc. (Title VII-race-individual)
W.D. Pa., No. 85-2843, filed Dec. 5, 1985, Philadelphia DO.
Failure to call in a Black part-time employee as frequently as similarly situated White employees.

Fairchild Industries, Inc. (Title VII-religion-individual)
M.D. N.C., No. C-85-1296-WS, filed Dec. 5, 1985, Charlotte DO.
Employee discharged after she elected to observe certain religious holidays which Respondent refused to recognize or attempt to accommodate.

General Lines, Inc. (Equal Pay Act/Title VII-sex-retal.-individual)
D. Wyo., No. 85-517-B1, filed Dec. 5, 1985, Denver DO.
Two female liquor storeclerks fired for protesting unequal pay for equal work; and, male promoted instead of the two women for sex discriminatory reasons.

Gary and Roger Link (Title VII-sex-retaliation-individual)
E.D. Mo., No. 85-2928-C-4, filed Dec. 6, 1985, St. Louis Do.
Female employee subjected to sexual harassment by an owner/employer, and fired for complaining about such conduct.

General Motors Corp.; Verdugo v. (Title VII-sex-individual)
D. N.J., No. 85-200, intervened Dec. 9, 1985, Philadelphia DO.
Intervention in a private lawsuit alleging sexual harassment and constructive discharge of a female employee.

Beznos Management Co. (ADEA/Title VII-race-individual)
E.D. Mich., No. 85-CV-75606DT, filed Dec. 10, 1985, Detroit DO.
A 57-year-old Black maintenance worker discharged, because of his age and/or race, by the new supervisor of an apartment complex.

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Telcum, Inc. (Title VII-sex-individual)
E.D. Cal., No. C85-1703-EJG, filed Dec. 10, 1985, San Francisco DO.
Employee fired from her job as a bookkeeper shortly after advising the manager that she was pregnant.

Chrysler Corp. (Title VII-religion-class)
N.D. Ohio, No. C85-3725A, filed Dec. 11, 1985, Cleveland DO.
Challenge to a policy of granting religious-leave accomodations only to members of certain recognized churches.

Mallinckrodt, Inc. (Title VII-retaliation-individual)
D. Md., No. HAR-85-4861, filed Dec. 13, 1985, Baltimore DO.
Black employee discharged in retaliation for having earlier filed a race discrimination charge.

Pancho's Mexican Buffet (Title VII-race-individual)
E.D. Tex., No. B85-1728CA, filed Dec. 13, 1985, Houston DO.
Black waitress discharged for unexcused absence, while Whites were not discharged for the same offense.

Catholic Social Services (Title VII-sex-class)
C.D. Ill., No. 85-2468, filed Dec. 16, 1985, Chicago DO.
Challenge to pregnancy/maternity leave policy which discriminates against females.

General Mills Restaurant Group, Inc. (Title VII-sex-class)
D. Ariz., No. CIV85-2678-PHX-WEC, filed Dec. 16, 1985, Phoenix DO.
Pattern-and-practice of sex segregation in hiring and assignments: men excluded from server and host jobs; women excluded from busing, food line and utility jobs.

Ithaca Industries, Inc. (Title VII-religion-individual)
W.D. N.C., No. C-C-85-687-P, filed Dec. 16, 1985, Charlotte DO.
Employee discharged by employer who refused to make any reasonable accomodation for his religious beliefs, which prohibit labor on Sundays.

Papercone Corp.; Murphy v. (Title VII-race-class)
W.D. Ky., No. C84-0654-L(A), intervened Dec. 16, 1985, Indianapolis.
Intervened in pattern-and-practice suit alleging race discrimination against Blacks in hiring and recruitment of entry-level production workers.

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Tri-Associates Training (Title VII-sex-individual/class)
N.D. Ill., No. 85-C-10387, filed Dec. 16, 1985, Chicago DO.
Employee terminated after informing employer of her pregnancy; and challenge to a health insurance policy which excludes certain medical expenses associated with pregnancy and childbirth.

United Methodist Homes and Service (Title VII-sex-class)
N.D. Ill., No. 85-C-10388, filed Dec. 16, 1985, Chicago DO.
Policy of requiring pregnant employees to cease working at a certain point and remain on leave for a certain period after delivery.

Allstate Insurance Company (Equal Pay Act/Title VII-sex-class)
W.D. Tex., No. A-85-CA-707, filed Dec. 18, 1985, Houston DO.
Female "Claims Examiners" paid less than males performing substantially equal work.

City of Fresno (ADEA-class)
E.D. Cal., No. CV-F-85-707EDP, filed Dec. 18, 1985, San Francisco DO
Policies of refusing to hire persons over age 30 as firefighters or police officers, and requiring such employees to retire at age 60.

Wayside World Corp. (Title VII-sex-individual)
W.D. Va., No. 85-0171-H, filed Dec. 18, 1985, Baltimore DO.
Female fired for violating rule against fraternization with other employees on the job, while male was not fired for same incident.

City of Chicago Police Department (ADEA-class)
N.D. Ill., No. 85-C-10478, filed Dec. 19, 1978, Chicago DO.
Challenge to a policy of refusing to permit police officers over age 45 to take certain special training courses which were prerequisites to advancement and/or promotion.

Arthur H. Fulton, Inc. (Title VII-sex-class)
M.D. N.C., No. C-85-1390-G, filed Dec. 20, 1985, Charlotte DO.
Refusal to hire females as truck drivers for overt sex discriminatory reasons; failure to display EEO posters or file EEO-1 reports.

Wometco Broadcasting, Inc. (ADEA/EPA/Title VII-sex-individual)
S.D. Fla., No. 85-3873-CIV-N, filed Dec. 20, 1985, Miami DO.
Assistant News Director, aged 64, constructively discharged for age reasons and replaced by a 43-year-old male earning twice her final salary for performing substantially equal work.

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Cummins Engine Company (ADEA-class)
S.D. Ind., No. IP85-1811-C, filed Dec. 23, 1985, Indianapolis DO.
Challenge to policy of denying severance pay to laid-off employees who refuse to waive their rights to file ADEA charges and to participate in investigations or other proceedings involving ADEA claims.

Contra Costa County Employees Retirement Ass'n, et al. (ADEA-class)
N.D. Cal., No. 85-9370, filed Dec. 26, 1985, San Francisco DO.
Public safety employees, who were age 35 or older when hired, denied equal pension benefits without any age-related cost justification.

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FOR YOUR INFORMATION

Litigation Talking Points

FISCAL YEAR	TOTAL COURT ACTIONS	CLASS ACTION LAWSUITS*	INDIVIDUAL LAWSUITS*	SUBPOENA ENFORCEMENTS
82	241	69 (42%)	95 (58%)	77
83	195	75 (55%)	61 (45%)	59
84	310	112 (51%)	110 (49%)	88
85	411	155 (54%)	131 (46%)	125
86**	116	42 (43%)	56 (57%)	18

* Percentage is of total lawsuits filed.

**For first quarter ending December 31, 1985

Complete data on the type of cases filed were not maintained by the Office of General Counsel prior to fiscal year 1982.

Source: Administrative and Technical Services Staff
Office of General Counsel

eeoc
U.S. Equal Employment
Opportunity Commission
Washington, D.C. 20506

NEWS

FOR IMMEDIATE RELEASE
Monday, December 2, 1985

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EEOC ENFORCEMENT ON RISE

WASHINGTON -- The U.S. Equal Employment Opportunity Commission today released reports of its enforcement activities during fiscal year 1985, showing that the Commission filed 411 court actions, including the most lawsuits ever filed by the agency under the Age Discrimination in Employment Act, and recovered a record-high $54.1 million in monetary benefits through litigation on behalf of victims of job discrimination.

The Commission received 72,002 charges of employment discrimination during the fiscal year and resolved 63,567 cases through determinations on the merits, negotiated settlements, conciliations and other administrative processes.

"This Commission is sending a clear message that our enforcement of the laws against discrimination is tough and thorough," EEOC Chairman Clarence Thomas said.

In its review of fiscal year 1985 activities, the agency's Office of General Counsel reported that the $54.1 million in monetary benefits was derived from successful resolution of 90 subpoena enforcement actions and 204 lawsuits by settlements, consent decrees or judgments.

The report, presented by Acting General Counsel Johnny Butler, highlighted several suits involving substantial monetary relief. Among them:

- An Age Discrimination in Employment Act suit against Equitable

- more -

Life Assurance Company which garnered $12.5 million for 360 persons;

- A sex discrimination judgment against Teachers Insurance and Annuity Association and the College Retirement Equities Fund resulting in $9.8 million in benefits and a projected value of some $2 billion to individuals whose annuity benefits will be recalculated in a sex-neutral manner; and
- A $5 million consent decree in a suit against Allstate Insurance Company for an alleged equal pay violation affecting 3,200 persons.

Last year, the Commission adopted an enforcement policy to achieve "certainty and predictability" in law enforcement. The policy declared [illegible]at "every case in which the District Director has found that on[illegible] more of our statutes has been violated should be submitted to the [illegible]ion for litigation consideration if attempts at conciliation fai[illegible]

The Ge[illegible] Counsel's report primarily credits this policy with resulting in [illegible]highest numbers of litigation recommendations ever received from [illegible]ne field and referred by the Office of General Counsel to the Commission. EEOC legal units in district offices across the country submitted 708 litigation recommendations in fiscal 1985. The Office of General Counsel referred 517 recommendations to the Commission for consideration.

"We have improved the agency's management to provide the best quality investigation and disposition of cases in as timely a manner as possible," Thomas said.

"Often in the past, EEOC didn't go to court because the case of the ordinary charging party was not considered worthy of litigation -- not enough money was involved or not enough new law could be developed. I believe it is the height of condescending arrogance to suggest that one person's right to be free of discrimination is less important than another's.

"The members of this Commission believe that we owe it to charging parties, who are victims of discrimination, to enforce our own findings," Thomas said.

Court actions filed by the Commission rose to 411 in fiscal 1985. Of lawsuits filed, 172 were under Title VII of the Civil Rights Act of 1964, 96 were under the Age Discrimination in Employment Act and 18 were under the Equal Pay Act. Investigative subpoena enforcement actions totalled 125

Class action cases (suits on behalf of groups of aggrieved persons or suits challenging policies and practices which affect such groups) accounted for 165, or 58 percent, of the lawsuits filed, including 75 (44%) under Title VII, 68 (71%) under ADEA and 10 (56%) under EPA.

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A listing and summary of each lawsuit filed and a synopsis of key lawsuit resolutions, by district office, is included in the General Counsel's report.

The Office of Program Operations, which oversees investigation of charges in agency field offices, reported that the EEOC received 72,002 charges of discrimination, including 67,119 charges brought directly to the agency (compared to 66,251 in fiscal 1984) and an additional 4,778 referred to the Commission by offices outside the agency, such as state and local Fair Employment Practices agencies, for a total 71,897 charges to process.

James Troy, director of the agency's Office of Program Operations, reported that case closures were up in fiscal 1985, to 63,567, compared to 55,034 the previous fiscal year. Agency emphasis on more full investigations is evidenced by an increase in the percentage of case closures based on the merits, from 50.6 percent in fiscal 1984, to 59.3 percent in fiscal 1985. Remaining closures were attributed to negotiated settlements and administrative closures, including inability to locate the charging party, failure of the charging party to cooperate and lack of agency jurisdiction. Administrative closures decreased from 29 percent in fiscal 1984, to 26.3 percent in fiscal 1985.

In addition, 47,693 charges were received by state and local agencies, constituting 39.8 percent of all charges and 1.8 percent more than the agencies received in fiscal 1984.

Altogether, EEOC and state and local agencies received 119,695 charges of employment discrimination during the fiscal year, a ratio of one charge for every 2,000 persons in the United States.

Despite necessary staffing freezes during the fiscal year, aged cases, those pending over 300 days, were kept to an acceptable level. These cases were 5.6 percent of inventory, up from 3 percent in fiscal 1984, and 1.6 percent above the agency's fiscal 1985 goal. Field staff also was able to maintain a manageable inventory of 11 months, only one month over the estimate associated with EEOC's fiscal 1986 budget request.

Troy said that the ability of field offices to keep up with the increasing workload, while remaining true to the agency's commitment to conduct more full investigations, is a "positive reflection of the many innovative approaches developed and implemented by field management."

Title VII charges continue to comprise the largest workload for EEOC as well as state and local agencies: 74.1 percent and 82.6 percent, respectively.

EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, or national origin; the Age Discrimination in Employment Act; the Equal Pay Act; and, in the federal sector, prohibitions against discrimination because of handicap.

# # #

Office of
General Counsel

OCT 18 1985

MEMORANDUM

TO : Clarence Thomas, Chairman
Tony E. Gallegos, Commissioner
William A. Webb, Commissioner
Fred W. Alvarez, Commissioner
R. Gaull Silberman, Commissioner

FROM : Johnny J. Butler
General Counsel (Acting)

RE : Lawsuits Filed by the EEOC in FY 1985

According to reports recently submitted by the district office legal units, which may be subject to minor revisions after verification by the Office of the General Counsel, the Commission filed at least 411 legal actions during Fiscal Year 1985. This represents an increase of almost one-third over the 310 actions filed in Fiscal Year 1984. Of the filings in Fiscal Year 1985, 125 were investigative subpoena enforcement actions and 286 were actions on the merits of discrimination claims: 172 under Title VII of the Civil Rights Act of 1964, 96 under the Age Discrimination in Employment Act, and 18 under the Equal Pay Act. The following is a summary of complaint allegations in the Commission's 286 substantive lawsuits.

Central Soya Company (Title VII-sex-class)
N.D. Ind., No. F84-0318, filed Oct. 1, 1984, Indianapolis DO.
Anecdotal and statistical evidence of a pattern-and-practice of sex discrimination against women in hiring and job assignments.

Norfolk & Western Railway Company (Title VII-race-individual)
S.D. W.Va., No. 84-3476, filed Oct. 2, 1984, Philadelphia DO.
Black employee denied promotion to supervisory position, while three less experienced and less senior white employees were promoted.

Chemical Express Company (Title VII-sex-class)
W.D. Tex., No. SA-84CA-2048, filed Oct. 4, 1984, Houston DO.
Denial of pregnancy-related health insurance coverage for spouses of male employees, while providing full coverage for spouses of female employees.

Ravakesh, Inc. (ADEA-class)
E.D. Wis., No. 84-C-1259, filed Oct. 4, 1984, Milwaukee DO.
Termination of four older waitresses (ages 55-67) and replacement by younger hirees (ages 22-30) for overtly age discriminatory reasons.

IGW Systems, Inc. (ADEA-class)
S.D. Ind., No. IP-84-1422, filed Oct. 23, 1984, Indianapolis DO.
Statistical evidence, confirmed by some anecdotal evidence, showing that a disproportionate share of salaried employees age 55 or older were terminated during a reduction-in-force.

Keeprite Cardinal, Inc. (Title VII-sex-class)
N.D. Oh., No. C84-3333Y, filed Oct. 24, 1984, Cleveland DO.
Female employee fired after notifying employer of her pregnancy; failure to provide medical insurance coverage for pregnancy-related conditions.

Washington State Patrol (ADEA-class)
W.D. Wash., No. C-84-683T, filed Oct. 24, 1984, Seattle DO.
Challenge to policies of refusing to hire applicants over age 35 as state patrol officers, and of retiring all such officers at age 60.

I-44 Spingfield, Inc. (Title VII-sex-individual)
W.D. Mo., No. 84-3504-CV-S4, filed Oct. 26, 1984, St. Louis DO.
Female comptroller discharged because of her impending marriage to one of the employer's other officials.

Watling Ladder Company (Title VII-sex-class)
E.D. Mo., No. 84-2544-C-1, filed Oct. 30, 1984, St. Louis DO.
Challenge to health insurance policy which provides reduced benefits only for pregnancy-related conditions.

West Coast Shipping Company (Title VII-sex-class)
C.D. Cal., No. CV-84-8398, filed Oct. 30, 1984, Los Angeles DO.
Failure or refusal to hire women as deck/utility employees despite union referrals of qualified individuals.

Swindell Rust Division, Rust Int'l Corp. (ADEA-individual)
W.D. Pa., No. 84-2636, filed Oct. 31, 1984, Philadelphia DO.
Layoff and failure-to-recall an employee, age 64, while younger and less senior colleagues were retained in or recalled to the same job as a scheduler.

Allen Couty Sheriff's Department (Equal Pay Act-class)
N.D. Oh., No. C84-7906, filed Nov. 2, 1984, Cleveland DO.
Female jail matrons paid less than male jail guards performing substantially equal work.

California Public Employees Retirement System (ADEA-class)
E.D. Cal., No. S-84-1533-LKK, filed Nov. 15, 1984, San Francisco DO.
Challenge to state law requiring municipal governments to retire all public-safety employees at age 60.

Stanley Steemer International, Inc. (Title VII-sex-individual)
M.D. Fla., No. 84-1546-CIV-T-13, filed Nov. 15, 1984, Miami DO.
Female employee fired after notifying her employer that she was pregnant.

State of Oregon, Dep't of Human Resources (ADEA-class)
D. Ore., No. C84-1388, filed Nov. 15, 1984, Seattle DO.
Action seeking make-whole relief for correction officers who were involuntarily retired at age 60 pursuant to a former state law.

Snohomish County (ADEA-class)
W.D. Wash., No. C84-1574, filed Nov. 20, 1984, Seattle DO.
Challenge to policy of refusing to consider any individual age 35 or older for possible employment in the position of deputy sheriff.

Hoosier Fiberglass, Inc. (Title VII-sex-class)
N.D. Ind., No. S84-0711, filed Nov. 21, 1984, Indianapolis DO.
Failure or refusal to provide health insurance coverage only for pregnancy-related conditions.

All Alaskan Seafoods Corp. (Title VII-sex/retaliation-individual)
W.D. Wash., No. C-84-1651, filed Nov. 30, 1984, Seattle DO.
Female employee denied promotion to supervisory position for overt sex discriminatory reasons and fired after complaining that the promotion denial was sex-based.

Harris Western Center (Title VII-sex-class)
W.D. Tex., No. SA-84CA-2479, filed Dec. 4, 1984, Houston DO.
Female employees denied medical insurance for pregnancy-related conditions, while other conditions were not similarly excluded from coverage.

Township of Tinicum (ADEA-class)
E.D. Pa., No. 84-5946, filed Dec. 5, 1984, Philadelphia DO.
Challenge to state law requiring local governments to retire pension eligible public-safety employees as a first step in any layoff.

Michigan Osteopathic Medical Center (ADEA-retaliation-individual)
E.D. Mich., No. 84-CV-05850-DT, filed Dec. 21, 1984, Detroit DO.
Involuntary transfer and threatened discharge of individual, age 53, because he had filed an ADEA charge concerning an earlier demotion.

Orleans Materials and Equipment Co. (ADEA-class)
E.D. La., No. 84-6060, filed Dec. 21, 1984, New Orleans DO.
Statistical evidence, confirmed by some anecdotal evidence, showing that a highly disproportionate share of production employees age 60 and older were laid off during a reduction-in-force.

Klopfensteins, Inc. (Title VII-sex-class)
D. Ore., No. C-84-1569, Dec. 26, 1984, Seattle DO.
Denial of pregnancy-related medical insurance coverage for spouses of male employees, while providing full coverage to spouses of female employees.

Board of Trustees, United Metal Trades Ass'n (Title VII-sex-class)
D. Ore., No. C84-1677, filed Dec. 27, 1984, Seattle DO.
Denial of pregnancy-related medical insurance coverage for spouses of male employees, while providing full coverage to spouses of female employees.

County of Los Angeles Fire Department (ADEA-class)
C.D. Cal., No. CV-84-9853, filed Dec. 27, 1984, Los Angeles DO.
Threat to involuntary retire a Deputy Fire Chief, upon attaining age 60, pursuant to a state law.

Golden West Nursing Home, Inc. (Title VII-sex/retaliation-indiv.)
D. Colo., No. 84-Z-2423, filed Dec. 27, 1984, Denver DO.
Female bookkeeper sexually harassed and constructively discharged because she resisted sexual advances by her supervisor.

International Telephone (Title VII-sex-class)
N.D. Ill., No. 84-C-10991, filed Dec. 28, 1984, Chicago DO.
Pattern-and-practice of not reinstating female employees desiring to return to work after pregnancy leave.

Sybaris Inn (Title VII-race-class)
N.D. Ill., No. 84-C-10992, filed Dec. 28, 1985, Chicago DO.
Pattern-and-practice of refusing to hire blacks for housekeeper positions.

Foxfire Exploration, Inc. (Title VII-sex-individual)
D. Colo., No. 85-M-92, filed Jan. 14, 1985, Denver DO.
Female geologist technician discharged because of absences due to pregnancy-related disability, while male employees not discharged for absences due to other temporary disabilities.

Louisiana Dep't of Wildlife and Fisheries (ADEA-class)
M.D. La., No. 85-29-SA, filed Jan. 14, 1985, New Orleans DO.
Challenge to state law requiring all "Wildlife Enforcement Agents" to retire upon attaining age 65.

Essex Controls Div., United Technologies Corp. (Title VII-sex-class)
M.D. Tenn., No. 3-85-0043, filed Jan. 15, 1985, Memphis DO.
Challenge to disability insurance plan which excludes only pregnancy related conditions from coverage.

United Teachers of Baltimore City (Title VII-sex-class)
D. Md., No. HM-85-189, filed Jan. 15, 1985, Baltimore DO.
Denial of temporary disability benefits for pregnant employees, while providing disability benefits to employees disabled by other causes.

Governor Mifflin Sch. Dist. & Gov. Mifflin Educ'l Ass'n (ADEA-class)
W.D. Pa., No. 85-0241, filed Jan. 16, 1985, Philadelphia DO.
Challenge to salary "compaction" agreement providing larger annual pay increases for new teachers, at the expense of smaller increases for more senior teachers.

A. T. & T. Technologies, Inc. (Title VII-national origin-individual)
M.D. N.C., No. C-85-96-G, filed Jan. 18, 1985, Charlotte DO.
Administrative employee denied promotion to managerial position, because of national origin (Hispanic).

Siemens-Allis, Inc.; Antonopoulos & EEOC v. (ADEA-individual)
E.D. Wis., No. 84-C-0853, intervened Jan. 29, 1985, Milwaukee DO.
Engineer, age 55, laid off because of retirement eligibility in lieu of laying off a less experienced and less senior colleague, age 35.

Mora Financial Corp. (ADEA-class)
C.D. Cal., No. CV-85-0736-JMI, filed Jan. 31, 1985, Los Angeles DO.
Discharge of two waitresses and a hostess (ages 41-46) and replacement by younger hirees (under age 30).

Wheeling-Pittsburgh Steel Corp. (ADEA-class)
W.D. Pa., No. 85-0346, filed Feb. 11, 1985, Philadelphia DO.
Selection of three foremen (ages 55, 61, 62) for permanent layoff, because they were eligible for retirement, while retaining several less expereienced and less senior foremen who were not eligible for retirement.

Peter Hauptman Company (Title VII-race-class)
E.D. Mo., No. 85-0360-C-4, filed Feb. 12, 1985, St. Louis DO.
Challenge to policy of assigning retail accounts to sales representatives on the basis of race.

Julius Wile & Sons, Inc. (Title VII-sex-individual)
N.D. Ill., No. 85-C-01392, filed Feb. 13, 1985, Chicago DO.
Female employee involuntarily reassigned to a lower paying and less strenuous position, because she was pregnant.

Elder-Beerman Stores, Inc. (Equal Pay Act & Title VII-retal.-indiv.)
S. D. Oh., No. C-3-85-81, filed Feb. 14, 1985, Cleveland DO.
Retaliatory discharge of female employee for having filed an equal-pay and sex-wages discrimination charge.

Kroger Company & Teamsters Local 327 (Title VII-sex/retal.-class)
M.D. Tenn., No. 3-85-0210, filed Feb. 20, 1985, Memphis DO.
Temporary injunction to restrain threatened termination of 3 female employees who complained of sex discrimination, and to require the union to fairly represent the women.

Skaggs Companies, Inc. (Title VII-sex/retaliation-individual)
S.D. Tex., No. H-85-883, filed Feb. 21, 1985, Houston DO.
Female employee sexually harassed by supervisor and fired for resisting his sexual advances.

Morrison-Knudsen, Inc. (ADEA-class)
D. Idaho, No. 85-1055, filed Feb. 22, 1985, Seattle DO.
Challenge to policy of mandatorily retiring company airplane pilots at age 62.

Julian Dart dba Kincaid Hotel (Title VII-national origin-individual)
W.D. Tex., No. DR-85-CA-05, filed Feb. 25, 1985, Houston DO.
Front desk clerk fired by new manager, because of overt bias against Mexican-Americans.

Varco-Pruden Buildings, Div. of AMCA Int'l Corp. (ADEA-individual)
M.D. N.C., No. 85-328-WS, filed Mar. 18, 1985, Charlotte DO.
Termination of secretary, age 52, for an overtly age discriminatory reason and replacement by a newly hired individual, age 28.

City of Bowling Green (ADEA-class)
W.D. Ky., No. C85-0056-BG(S), filed Mar. 20, 1985, Memphis DO.
Challenge to policy of mandatorily retiring all police officers and firefighters at age 57.

City of Daly City (ADEA-individual)
E.D. Cal., No. S85-0416, filed Mar. 20, 1985, San Francisco DO.
Involuntary retirement of a police dispatcher at age 60, pursuant to state law.

Baptist Medical Center (ADEA-individual)
W.D. Mo., No. 85-0290-CV-W-9, filed Mar. 20, 1985, St. Louis DO.
Failure to promote employee, age 53, into a "utility worker" job in preference to a less senior employee, age 23, for an overtly age discriminatory reason.

Erie Community College (ADEA-individual)
W.D. N.Y., No. 85-CIV-0368E, filed Mar. 20, 1985, New York DO.
Failure to promote employee, age 61, to any of several supervisory mechanic positions for which he was well qualified, and the promotion instead of younger and less senior colleagues.

Bethlehem Steel Corp. (ADEA-individual)
D. Md., No. N-85-1227, filed Mar. 22, 1985, Baltimore DO.
Failure to recall employee, age 61, in preference to a less senior employee, age 28, for an overtly age discriminatory reason.

Mississippi University for Women (Equal Pay Act-class)
N.D. Miss., No. EC85-146-LS-D, filed Mar. 25, 1985, Birmingham DO.
Pattern of paying female instructors and professors less than their male colleagues of the same rank.

Alfred Hughes Property Management, Inc. (Title VII-nat'l origin-cl.)
S.D. Tex., No. H-85-1504, filed Mar. 26, 1985, Houston DO.
Pattern-and-practice of national origin discrimination in that all Mexican-American maintenance employees were discharged, while other employees were retained.

National Starch & Chemical Corp. (Title VII-sex/retaliation-indiv.)
S.D. Ind., No. IP85-427C, filed Mar. 29, 1985, Indianapolis DO.
Demotion of female employee who refused to submit to supervisor's sexual advances.

Norrell Services, Inc. (Equal Pay Act-class)
N.D. Ga., No. C85-2285A, filed Mar. 29, 1985, Atlanta DO.
Female credit supervisors paid less than male colleagues performing substantially equal work.

State of Texas Purchasing and General Serv. Comm. (ADEA-individual)
W.D. Tex., No. A-85-CA-185, filed Mar. 29, 1985, Houston DO.
Refusal to hire applicant, age 61, for "security officer" position for an overtly age discriminatory reason.

Antelope Building Maintenance, Inc. (Title VII-sex/retal.-indiv.)
D. N.M., No. 85-0487C, filed Apr. 2, 1985, Phoenix DO.
Demotion and constructive discharge of female employee who resisted sexual advances of her supervisor.

Process Plants, Inc. (Title VII-race-class)
M.D. La., No. 85-843, filed Apr. 8, 1985, New Orleans DO.
Pattern-and-practice of failing or refusing to hire qualified black applicants as welders.

City of Charlotte (ADEA-class)
W.D. N.C., No. C-C85-245-M, filed Apr. 11, 1985, Charlotte DO.
Challenge to policies of refusing to consider applicants over age 30 for employment as firefighters, and requiring all such employees to retire at age 65.

Goodyear Aerospace Corp. (Title VII-race/retaliation-individual)
D. Ariz., No. 85-1024-PHX-PGR, filed Apr. 11, 1985, Phoenix DO.
Black employee denied promotion, because of her race and in retaliation for filing a race discrimination charge concerning an earlier promotion denial.

International Total Services, Inc. (Title VII-national origin-class)
D. Utah, No. 85-C-0453A, filed Apr. 11, 1985, Phoenix DO.
National origin discrimination based on new owner's practice of discharging all non-Korean employees.

Douglas County Council Against Alcohol and Drug Abuse (Title VII-religion-individual)
D. Ore., No. 85-6139-E, filed Apr. 29, 1985, Seattle DO.
Native American employee fired for participating in a teepee ceremony of the Native American Church, during which he ingested peyote.

Broome Construction, Inc. (Title VII-agreement-individual)
S.D. Miss., No. H85-0162(B), filed April 30, 1985, Birmingham DO.
Action to enforce terms of pre-determination settlement agreement, which provided that the employer would hire a black applicant into the next available laborer position.

Georgia Department of Transportation (ADEA-class)
N.D. Ga., No. C85-2784A, filed May 1, 1985, Atlanta DO.
Challenge to state law requiring "Transportation Safety Officers" to retire at age 65.

Apple Personnel, Inc. (Title VII-retaliation-individual)
W.D. Tex., No. Misc-2022G, filed May 2, 1985, Dallas DO.
Temporary injunction to restrain threatened firing of black employee who filed a charge alleging race discrimination in assignments.

City of Detroit (ADEA-class)
E.D. Mich., No. 85-CIV-71984-DT, filed May 3, 1985, Detroit DO.
Challenge to city charter provision establishing an age-60 mandatory retirement policy for police officers and firefighters.

Detroit Fire Fighters Ass'n v. City of Detroit & EEOC (ADEA-class)
Mich. Cir. Ct., No. 84-433272-CL, intervened May 3, 1985, Detroit DO
Intervened as defendant in state court action seeking enforcement of a city charter provision requiring firefighters to retire at age 60.

Newcomer Products, Inc. (ADEA-individual)
W.D. Pa., No. 85-1120, filed May 5, 1985, Philadelphia DO.
Layoff of the oldest clerical employee, age 60, for an overtly age discriminatory reason.

Rice Electric Supply Company (Title VII-sex-class)
E.D. Tenn., No. 1-85-295, filed May 6, 1985, Memphis DO.
Denial of pregnancy-related medical insurance coverage for spouses of male employees, while providing full coverage for spouses of female employees.

Swan Services, Inc. (Title VII-race-individual)
N.D. Ga., No. C85-3121A, filed May 17, 1985, Atlanta DO.
Black employee denied promotion to branch manager position, because of his race.

Wilshire Westlake Medical Group (Title VII-sex-individual)
C.D. Cal., No. CV-85-3336, filed May 17, 1985, Los Angeles DO.
Female office manager fired for overt sex discriminatory reasons, after notifying her employer that she was pregnant.

Cushman & Wakefield (Title VII-sex-class)
S.D. N.Y., No. 85-CIV-3826, filed May 21, 1985, New York DO.
Pattern-and-practice of discharging and refusing to rehire female employees who take pregnancy leave.

Michoud Division, Martin Marietta Corp. (Title VII-race-individual)
E.D. La., No. 85-2268, filed May 22, 1985, New Orleans DO.
Failure to promote an engineer into a management position, because of his race (black).

Farmer Brothers Company (Title VII-sex-class)
W.D. Wash., No. C85-938, filed May 28, 1985, Seattle DO.
Pattern-and-practice of excluding fully qualified women from route sales positions.

Champion Shipyards, Inc. (Title VII-race/retaliation-class)
S.D. Miss., No. S85-0665(N), filed May 29, 1985, Birmingham DO.
Two black supervisors fired for refusing to participate in management decision to discharge a black employee who had complained of various race discriminatory employment practices.

The Big Picture Company (ADEA-class)
W.D. Tex., No. 85-CA-1801, filed June 3, 1985, Houston DO.
Refusal to hire four photographers, ages 44-55, for government contract work, even though they worked for the prior contractor and even though two other former employees, ages 28 and 33, were rehired by new contractor.

Blast Intermediate Unit 17 (Equal Pay Act-class)
M.D. Pa., No. 85-0774, filed June 6, 1985, Philadelphia DO.
Female teacher's aides paid less than male aide performing substantially equal work.

Commonwealth Edison (Title VII-sex-individual)
N.D. Ill., No. 85-C-5637, filed June 17, 1985, Chicago DO.
Refusal to permit male employee to take parental leave, while permitting female employees to take such leave.

City of Baytown & State of Texas (ADEA-class)
S.D. Tex., No. H-85-3477, filed June 18, 1985, Houston DO.
Challenge to state law prohibitting local governments from hiring any individual age 36 or older for a "beginning" police officer positions.

Ted Glasrud Associates, Inc. (Title VII-race-individual)
S.D. Fla., No. 85-8347-CIV(G), filed June 18, 1985, Miami DO.
Black employee fired from her housekeeper position for overt race discriminatory reasons.

SKF Industries, Inc. (Title VII-sex-individual)
M.D. Pa., No. 85-0816, filed June 18, 1985, Philadelphia DO.
Female foreman demoted and then permanently laid-off for overt sex discriminatory reasons.

Gryphon Corp. (Title VII-sex/retaliation-individual)
D. Neb., No. CV85-O-612, filed June 19, 1985, Denver DO.
Female employee sexually harassed by manager and discharged in retaliation for filing a sex discrimination charge.

Brink's, Inc. (Title VII-race/retaliation-individual)
E.D. Ark., No. C-85-449, filed June 21, 1985, New Orleans DO.
Failure to promote a black employee to branch manager position, because of his race and/or in retaliation for his having filed a prior race discrimination charge.

C & L Trucking, Inc. (Title VII-sex-class)
E.D. Ark., No. C-85-448, filed June 21, 1985, New Orleans DO.
Pattern-and-practice of laying off unmarried female truck drivers during a workforce reduction.

Pembroke Construction Company (ADEA-individual)
E.D. Va., No. 85-93-NN, filed June 21, 1985, Baltimore DO.
Discharge/failure to rehire a mechanic, age 63, for pretextual reasons and despite retention/hiring of several younger and much less experienced mechanics.

Multi-Fittings, USA (Title VII-retaliation-individual)
N.D. Tex., No. CA-3-85-1219, filed June 27, 1985, Dallas DO.
Retaliatory discharge of employee who filed a charge alleging discrimination on the basis of national origin (Hispanic).

Vermont Department of Public Safety (ADEA-class)
D. Vt., No. 85-166, filed June 27, 1985, New York DO.
Challenge to policies of refusing to consider applicants over age 34 for employment as State Police officers, and of requiring all such officers to retire at age 55.

City of Gulfport (ADEA-class)
S.D. Miss., No. S85-0813(N), filed June 28, 1985, Birmingham DO.
Challenge to policies of refusing to consider persons age 41 or over for employment as police officers and firefighters, and of requiring all such officers to retire at age 65.

Spires Condominiums, Inc. (Title VII-race-individual)
S.D. Tex., No. H-85-3677, filed June 28, 1985, Houston DO.
Black security guard summarily fired for sleeping while on duty, even though white guards were first given a warning for the same offense.

Intermodal, Inc. & Machinists District No. 9 (Title VII-race-class)
S.D. Ill., No. 85-5409, filed July 1, 1985, St. Louis DO.
Statistical pattern, supported by some anecdotal evidence, of race discrimination in hiring of mechanics.

Mississippi Dep't of Wildlife Conservation (ADEA-class)
S.D. Miss., No. J85-0669-B, filed July 1, 1985, Birmingham DO.
Challenge to new state law requiring conservation officers to retire at age 62, including incumbent officers already over that age.

State of Wyoming (ADEA-class)
D. Wyo., No. C85-0272, filed July 5, 1985, Denver DO.
Challenge to state law requiring Highway Patrol officers to retire upon attaining age 55 and completing 25 years of service.

State of Georgia (ADEA-class)
N.D. Ga., No. C85-3448-A, filed July 8, 1985, Atlanta DO.
Challenge to state laws requiring various categories of state public safety employees to retire at ages 55, 60, or 65.

Blueview Nurseries, Inc. (Equal Pact Act-class)
D. Mass., No. 85-2909-MC, filed July 15, 1985, New York DO.
Female landscape designers paid lower wage rates than males performing substantially equal work.

Cibilo Manufacturing Company (Title VII-sex-individual)
W.D. Tex., No. SA-85-CA-2178, filed July 15, 1985, Houston DO.
Experienced female welder denied employment, while less experienced males were hired as welders.

City of New York Fire Department (ADEA-class)
S.D. N.Y., No. 85-CIV-5601, filed July 15, 1985, New York DO.
Challenge to policy of denying firefighters age 65 and older the same right as younger firefighters have to borrow against their accumulated pension contributions.

Loris Manufacturing Company (Title VII-race-individual)
D. S.C., No. 4:85-1920-2H, filed July 15, 1985, Charlotte DO.
White female supervisor fired because she was dating a black male production employee.

Southern Bell Telephone and Telegraph Co. (Title VII-sex-class)
W.D. N.C., No. C-C-85-448-P, filed July 16, 1985, Charlotte DO.
Denial of disability benefits for pregnancy-related conditions, while providing such benefits for other disabilities.

Bluestem Broadcasting; Korst & EEOC v. (Equal Pay Act & Title VII-sex-class)
D. Kan., No. 85-1118-C, intervened July 19, 1985, St. Louis DO.
Female sales representatives paid less than male colleagues performing substantially equal work.

City of Cincinnati (ADEA-class)
S.D. Oh., No. C-1-85-1263, filed July 19, 1985, Cleveland DO.
Challenge to policies of refusing to consider applicants age 35 or older for employment as police officers, and applicants age 31 or older for employment as fire fighters.

Shelby County (Equal Pay Act-class)
W.D. Tenn., No. 85-2655GA, filed July 22, 1985, Memphis DO.
Female criminal court clerks paid lower wages than male clerks performing substantially equal work.

Search Day Program, Inc. (Title VII-sex-individual)
D. N.J., No. 85-6737, filed July 25, 1985, Philadelphia DO.
Refusal to permit teacher's aide to return to work from pregnancy leave for overt sex discriminatory reasons.

G. Brown Enterprises (Equal Pay Act-class)
D. Ore., No. 85-1326, filed July 29, 1985, Seattle DO.
Failure to pay female salespersons the same pay and commission rates as male salespersons performing substantially equal work.

McDowell County & State of West Virginia (ADEA-class)
S. D. W.Va., No. 85-0883, filed July 29, 1985, Philadelphia DO.
Termination of three correction officers, ages 48-51, who were "mistakenly" hired contrary to a state statute prohibiting the hiring of individuals over age 45.

Firestone Tire & Rubber Co. & United Rubber Workers-L. 168 (ADEA-cl)
W.D. Tenn., No. 85-2675-M-A, filed July 30, 1985, Memphis DO.
Challenge to policy of denying severance pay to permanently laid-off employees who are eligible for retirement.

McKellar Development Corp. (Title VII-retaliation-class)
N.D. Cal., No. C85-20475, filed July 31, 1984, San Francisco DO.
Retaliatory discharges of employees who complained to the employer about alleged discrimination on the basis of their national origin (Hispanic).

Pioneer Christian Academy (Equal Pay Act & Title VII-sex-class)
M.D. Tenn., No. 3-85-0886, filed July 31, 1985, Memphis DO.
Female administrators and teachers paid lower salaries than their male colleagues performing substantially equal work.

H. M. Rowe Company (Equal Pay Act & Title VII-retaliation-indiv.)
D. Md., No. N-85-3259, filed Aug. 1, 1985, Baltimore DO.
Retaliatory discharge of female employee who had filed an equal-pay and sex-wages discrimination charge.

Ready Reproductions, Inc. (Title VII-race-individual)
C.D. Cal., No. CV-85-5066-KN, filed Aug. 1, 1985, Los Angeles DO.
Black employee subjected to on-going racial harassment, including frequent use of racial epithets, by his supervisors and co-workers.

General Motors Corp. (Title VII-race/religion-individual)
W.D. Okla., No. CIV-85-2005T, filed Aug. 8, 1985, Dallas DO.
Failure of employer to take steps to stop racial and religious harassment of a Black Muslim employee by his co-workers.

Management and Training Corp. (Title VII-sex-individual)
M.D. Ga., No. 85-184-ALB, filed Aug. 8, 1985, Atlanta DO.
Female employee constructively discharged by removal from equipment operator training position for overt sex discriminatory reasons.

Mercantile Thrift Store, Inc. (Title VII-retaliation-individual)
E.D. Wis., No. 85-C-1205, filed Aug. 8, 1985, Milwaukee DO.
Discharge of store clerk, because she complained of sexual harassment by store manager.

Washington School for Secretaries, Inc. (Title VII-race-individual)
D. D.C., No. 85-2538, filed Aug. 8, 1985, Baltimore DO.
Black employee fired after complaining of alleged race discrimination in promotions.

Lufkin Industries, Inc.; Tierrablanca & EEOC v. (Title VII-sex-cl.)
E.D. Tex., No. L-84-109-CA, intervened Aug. 9, 1985, Houston DO.
Denial of pregnancy-related medical insurance for spouses of male employees, while providing full coverage for spouses of female employees.

Constantin Moraitis & C.M.-G.P.F., Inc. (Title VII-sex/retal.-class)
E.D. Mich., No. 85-0891, filed Aug. 9, 1985, Detroit DO.
Waitresses sexually harassed by restaurant/bar owner; retaliatory firing of female employee who filed the sex harassment charge.

Colgate Palmolive Co. (Title VII-religion-individual)
D. Kan., No. 85-2423, filed Aug. 13, 1985, St. Louis DO.
Temporary injunction to restrain demotion or firing of new foreman, who refused to work on Saturdays because of religious beliefs and who the employer refused to offer any reasonable accommodation.

Control Resources Corp. (Title VII-sex-class)
N.D. Oh., No. C85-2287A, filed Aug. 13, 1985, Cleveland DO.
Challenge to policy of not hiring females for work at construction sites where on-site, nude-showering is required for asbestos decontamination.

J-H Restaurants, Inc. (Title VII-agreement/retaliation-individual)
N.D. Ala., No. CV85-PT-2230-S, filed Aug. 19, 1985, Birmingham DO.
Failure to comply with terms of prior settlement agreement, and retaliatory discharge of black employee who was the charging party.

Health-Tex, Inc. (Title VII-agreement-individual)
N.D. Ala., No. CV85-AR-2233-M, filed Aug. 19, 1985, Birmingham DO.
Action to enforce pre-determination settlement agreement, which provided that the employer would promote female charging party into the next available quality control inspector position.

University of Notre Dame (Title VII-agreement-class)
N.D. Ind., No. S85-0479, filed Aug. 20, 1985, Indianapolis DO.
Action to enforce no-fault settlement agreement, which was entered in 1981 to resolve a 1978 lawsuit involving allegations of sex discrimination.

Dollar Tire Company (Title VII-sex-class)
S.D. Tex., No. H-85-5003, filed Aug. 23, 1985, Houston DO.
Pattern-and-practice of sexual harassment of female employees by one of the employer's owners.

Monroe Nursing Nursing Home, Inc. (Title VII-retaliation-individual)
S.D. Ala., No. 85-1066-C-C, filed Aug. 23, 1985, Birmingham DO.
Black employee fired in retaliation for refusing to withdraw a race discrimination charge.

Betty Zane Corp. (Title VII-national origin-individual)
S.D. Tex., No. H-85-5002, filed Aug. 25, 1985, Houston DO.
Mexican-American employee denied entry into manager trainee position in preference to a less qualified Anglo applicant, because of her national origin.

Knudsen Dairy Corp. (Title VII-sex-class)
C.D. Cal., No. CV-85-5654, filed Aug. 26, 1985, Los Angeles DO.
Pattern-and-practice of not hiring any women for production jobs in a dairy plant.

Houston Health Club, Inc. (Title VII-sex-individual)
S. D. Tex., No. H-85-5097, filed Aug. 28, 1985, Houston DO.
Employee discharged from her job as a receptionist after notifying her employer that she was pregnant.

Colonial Carolina Pottery, Inc. (Title VII-sex/retaliation-indiv.)
E.D. N.C., No. 85-141-CIV-4, filed Sept. 17, 1985, Charlotte DO.
Female employee subjected to sexual harassment and discharged for resisting sexual advances by employer.

Los Angeles Unified School District (ADEA-class)
C.D. Cal., No. CV-85-6176, filed Sept. 18, 1985, Los Angeles DO.
Involuntary retirement of "security agents" at age 65, pursuant to a state law.

Packaging Corporation of America (Title VII-race-individual)
W.D. Mo., No. 85-4405, filed Sept. 19, 1985, St. Louis DO.
Black employee summarily fired for disobeying supervisor's order, while white employees not discharged for the same offense.

Errol Estate Golf & Country Club, Inc. (Title VII-sex-class)
M.D. Fla., No. 85-1011-CIV-KRL, filed Sept. 20, 1985, Miami DO.
Three female bartenders fired by new manager for overtly sex discriminatory reasons.

Oak Park Teachers Association (Title VII-sex-class)
N.D. Ill., No. 85-C-8158, filed Sept. 20, 1985, Chicago DO.
Extended sick leave denied to employees disabled by reason of pregnancy, while provided to employees disabled by other causes.

Charles Stanley, Inc. (Title VII-sex-individual)
E.D. Cal., No. C85-1368-MLS, filed Sept. 24, 1985, San Francisco DO.
Refusal to reemploy female returning from pregnancy disability leave while otherwise reemploying persons returning from disability.

National Governors Association; Curry & EEOC v. (Title VII-retal.-individual)
D. D.C., No. 84-5267, intervened Sept. 24, 1985, Baltimore DO.
Black EEO counselor harassed because of her work and then fired in retaliation for filing a race discrimination charge.

Puget Sound Marketing Corp. (ADEA-class)
W.D. Wash., No. C85-984T, filed Sept. 24, 1985, Seattle DO.
Refusal to provide make-whole relief for two applicants, ages 40 and 41, who were denied "courtesy clerk" jobs pursuant to former policy of hiring only persons under age 20.

G.E.A. Rainey Corp. (ADEA-class)
N.D. Okla., No. 85-C-900-C, filed Sept. 27, 1985, Dallas DO.
Denial of any long-term disability insurance coverage for employees aged 65-69, even though an insurer offered to provide limited duration or reduced benefit coverage for such employees at the same per capita group rate as charged for all younger employees.

Gateway Coal Company (Title VII-sex-individual)
W.D. Pa., No. 85-2289, filed Sept. 27, 1985, Philadelphia DO.
Action to restrain on-going sexual harassment of a female employee by her supervisor.

Polish National Alliance of the U.S., #292 (Title VII-recordkeeping)
N.D. Ill., No. 85-C-8326, filed Sept. 27, 1985, Chicago DO.
Failure or refusal to file required EEO-1 form reports with the EEOC.

A.C. Williams Company (Title VII-sex-class)
N.D. Oh., No. C85-2884A, filed Sept. 27, 1985, Cleveland DO.
Challenge to policy of providing male employees who elect early retirement with lower monthly pension benefits than similarly situated females.

Woodies Rendezvous (Title VII-sex-class)
N.D. Ill., No. 85-C-8328, filed Sept. 27, 1985, Chicago DO.
Female employees sexually harassed by employer, and routinely fired if pregnant.

City of Girard (ADEA-class)
N.D. Ohio, No. C85-2630-Y, filed Sept. 30, 1985, Cleveland DO.
Refusal to hire applicants age 35 or older as police officers, in accordance with a state law.

Family Supermarket Corp. (Title VII-retaliation-individual)
W.D. N.C., No. C-C-85-563-P, filed Sept. 30, 1985, Charlotte DO.
Female fired from bookkeeper position shortly after the employer was notified that she had filed a sex-wages discrimination charge.

Fordney Hotel (ADEA-individual)
E.D. Mich., No. 85-CV-10421-BC, filed Sept. 30, 1985, Detroit DO.
Layoff of individual, age 41, from his job as "bouncer" at hotel bar and refusal to rehire that him for the same job as "door person."

South Carolina Dep't of Highways and Public Transp. (ADEA-class)
D. S.C., No. 3:85-2637-15A, filed Sept. 30, 1985, Charlotte DO.
Refusal to consider two applicants, age 40, for employment as state Highway Patrol officers, despite alleged removal of age-30 hiring limitation.

United Air Lines, Inc. (ADEA-class)
N.D. Ill., No. 85-C-8375, filed Sept. 30, 1985, Chicago DO.
Refusal to provide disability benefits to "flight officer" employees who become disabled after attaining age 60.

ATLANTA DISTRICT OFFICE

EEOC v. Metro Atlanta Boys Club
Commission obtained a consent decree providing $36,000 in monetary relief in this suit which alleged racial discrimination in wages, job assignments and terms and conditions of employment as well as employer retaliation against the charging party for filing a Title VII charge.

Other Resolutions	Basis	Type
EEOC v. Laing Properties, Inc.	Sex/Retaliation	$5,000 Settlement
EEOC v. Georgia Pacific	Sex	$788 pre-suit Settlement

BALTIMORE DISTRICT OFFICE

EEOC v. Calvert County Board of County Commissioners
In this EPA retaliation case, we obtained a settlement agreement providing for $92,000 in back wages as well as continued medical benefits coverage.

EEOC v. American Division of Litton Industries -- This was a Title VII suit in which the Commission alleged that the employer engaged in sex discrimination by denying medical benefits to male employees for the pregnancy related expenses of their spouses. A settlement agreement was reached providing $75,000 in monetary benefits for at least 40 affected persons.

EEOC v. Hampton Institute -- We brought this case to successful closure after trial. The suit alleged that the college violated the ADEA by maintaining a policy of involuntarily retiring non-tenured employees at age 65. We obtained $56,000 in monetary benefits.

EEOC v. Fairfax County -- This was an ADEA suit in which we were able to reach a settlement for $26,000 and a job offer for the charging party who was denied an auditor's position because he was 56 years old.

EEOC v. Piedmont Natural Gas Co. -- This Title VII race/discharge case was resolved by consent decree. The decree provided for approximately $4,000 in monetary benefits, as well as the formulation and implementation of a formal written discipline/discharge policy.

EEOC v. Clamdigger, Inc. -- This Title VII suit alleged discriminatory layoff and discharge of female employees due to pregnancy. Resolution was reached through a consent decree providing over $3,000 in monetary benefits.

EEOC v. Barclay Enterprises -- This Title VII suit involved discriminatory discharge on the basis of pregnancy. We reached a settlement agreement with the employer to provide $1,519 in monetary benefits.

Other Resolutions

EEOC v. Woonsocket Spinning Co.	- Subpoena Enforcement
EEOC v. Thurston Motor Lines	- Subpoena Enforcement
EEOC v. Pneumafil	- Subpoena Enforcement
EEOC v. Long Brothers	- Subpoena Enforcement
EEOC v. Kelly Springfield	- Subpoena Enforcement
EEOC v. Forsyth County Dept. of Social Services	- Subpoena Enforcement
EEOC v. Colonial Refrigerated Transportation, Inc.	- Subpoena Enforcement

CHICAGO DISTRICT OFFICE

EEOC v. Joslyn Manufacturing -- This Title VII suit involved sex discrimination. This employer provided full medical coverage for spouses of its female employees while limiting benefits for the pregnancy related expenses of spouses of its male employees. A consent decree obtained here provided for $4 million in monetary relief estimated to benefit 4,000 individuals.

EEOC v. Chrysler Corp. -- This Title VII sex discrimination suit was resolved by consent decree. The decree provided for over $619,000 in benefits for approximately 31 persons.

Other Resolutions

EEOC v. William Bell - Subpoena Enforcement
EEOC v. Loyola University - Subpoena Enforcement
EEOC v. Laborers Local 75 - Subpoena Enforcement
EEOC v. Maurey Manufacturing - Subpoena Enforcement
EEOC v. Maryland National - Subpoena Enforcement
EEOC v. Jones Truck Lines - Subpoena Enforcement
EEOC v. Robert Counsel - Subpoena Enforcement

CLEVELAND DISTRICT OFFICE

EEOC v. Aeronca -- This Title VII suit alleging racially discriminatory failure to hire and retaliation was resolved by judgment in EEOC's favor including $73,000 in monetary benefits.

EEOC v. Ohio Savings Association -- This suit alleged discrimination on the basis of sex in compensation, training and job assignment. A settlement agreement was reached providing $40,000 in monetary and $200,000 in other benefits.

EEOC v. Carter Carburetor -- This suit alleged discrimination on two bases -- race and sex. The employer maintained a practice of forced maternity leave and engaged in race discrimination in a number of employment areas -- hiring, promotion, apprenticeship training, discharge and segregated job classifications. The resolution by settlement agreement netted over $13,000 in benefits for 40 persons.

EEOC v. Automatic Vendors -- We obtained a consent decree in this sex discrimination case providing for approximately $43,000 in monetary benefits affecting over 100 persons.

EEOC v. Ball Corporation -- This Title VII sex discrimination case was resolved by consent decree providing $20,000 in monetary benefits affecting 106 employees.

EEOC v. Robertson Heating -- This ADEA suit involving involuntary retirement was resolved by consent decree providing $8,000 in benefits.

EEOC v. Corporal Forging -- This was a Title VII spousal benefits case resolved by consent decree providing over $6,000 in monetary benefits.

EEOC v. EDG, et. al.-- This was a Title VII suit alleging sex based wage discrimination. The consent decree obtained here provided benefits totalling more than $5,500 for 5 affected individuals.

EEOC v. Optic Electronic -- This combined Title VII/EPA suit alleged discrimination in wages and job classifications on the basis of sex. The consent decree obtained provided $3,525 in monetary benefits.

Other Resolutions

EEOC v. Continental National Bank	-- $2,000 Settlement Agreement
EEOC v. Decal Steaks	-- $1,564 Default Judgment
EEOC v. Richardson Savings & Loan	-- Subpoena Enforcement
EEOC v. Aycle Personnel	-- Subpoena Enforcement
EEOC v. Boswell ISD	-- Subpoena Enforcement

DENVER DISTRICT OFFICE

EEOC v. First Citizens Bank of Billings -- This was an EPA suit alleging unlawful wage disparity between male and female tellers, proof operators and installment loan operators. Judgment was rendered for the EEOC in the amount of $75,000. This amount was reduced by the trial court but later reinstated by the Court of Appeals for the Tenth Circuit.

EEOC v. Ford Motor Company -- This was an ADEA case involving unlawful demotion and forced early retirement on the basis of age. We were able to reach a settlement agreement providing $75,000 in monetary benefits.

EEOC v. Golden West Nursing Home -- This sexual harassment case was settled for $7,000 in relief.

EEOC v. Samsonite -- This suit alleged unlawful failure to promote on the basis of race in violation of Title VII. The district court rendered judgment in favor of the Commission for $6,500 and the case was settled after remand from the circuit court.

$38,000. At least 27 individuals benefited.

Other Resolutions

EEOC v. *Toote Memorial Hospital* -- Subpoena Enforcement
EEOC v. *Wayne County Civil Service* -- Subpoena Enforcement
EEOC v. *City of Pontiac* -- Subpoena Enforcement

HOUSTON DISTRICT OFFICE

EEOC v. *Homewood Building* -- The Commission's action alleged that the charging party was discharged from her position as a receptionist/ bookkeeper because of her pregnancy. The action was resolved by settlement agreement providing $6,250 in monetary benefits.

EEOC v. *Maloney - Crawford* -- This was a concurrent Title VII/EPA action alleging that the charging party was compensated at a lower rate than a male co-worker even though they were employed in the same position. The suit was resolved when the parties were able to reach a settlement of $7,500.

EEOC v. *N.L. Industries* -- This action alleged that the charging party was not promoted to the position of shipping and receiving supervisor because of his race. A settlement agreement reached in the case provided for $5,000 in monetary benefits as well as an annuity worth over $64,000.

EEOC v. *Southern Pacific* -- This was a multidistrict class action alleging that the defendants, Southern Pacific and thirteen union defendants, discriminated against Blacks, Hispanics and females in the areas of discharge, disqualification, promotion, transfer, assignment, and hiring. The consent decree obtained in this case provides for $3.4 million in monetary relief as well as job offers over the next few years calculated to be worth $30 million. It is estimated that the decree will benefit 1,500 persons.

EEOC v. Hosier Fiberglass -- The affected party was denied medical costs under the Company's disability insurance policy for charges related to pregnancy and childbirth. The denial was allegedly because her leave occurred prior to the date the defendant's policy was amended to include pregnancy. She was the only employee so affected.

The action was instituted under Title VII alleging violations of Section 703(a)(1) of Title VII, by failing and refusing to treat disabilities caused or contributed to by pregnancy and related medical conditions the same as disabilities caused by other medical conditions. The case was eventually resolved by a $1,500 consent decree.

EEOC v. International Harvester -- The Commission alleged termination based on race in violation of Title VII. The Company asserted that charging party, a black supervisor, had taken a lunch break at a local restaurant at 9:30 a.m. for a period of one hour and had failed to reprimand an hourly employee who was also taking a lengthy break at the same time. The Commission alleged that other supervisory personnel had done worse things without being terminated. The case involved a simple disparate treatment analysis. The case was resolved by stipulated dismissal upon settlement for $5,000.

EEOC v. Hammond Housing -- The Commission filed this ADEA action on behalf of a printer-foreman terminated by defendant. The court entered a consent decree in which Defendant was ordered to pay Mr. Holman $150,000 in three installments with 10.08% on the outstanding balance and to pay the Commission $2,633 for costs.

EEOC v. South Bend Community School Corporation -- Defendant School Corporation maintained two classifications of janitorial workers. Prior to reclassification of jobs, female custodians (CDI's) were paid less for jobs requiring the same skill, effort and responsibility. The defendant argued that the CD

EEOC v. Los Burritos -- This suit alleged charging party was discharged from her employment due to pregnancy in violation of Title VII. Respondent contends that it discharged plaintiff because its liability insurance policy did not cover pregnant employees beyond the 7th month. Preliminary relief was obtained in the amount of $5,000.

EEOC v. TWA -- Preliminary injunction was issued here when defendant attempted to eliminate an all black unit of skycaps on the basis that it was more beneficial to use a private vendor than to maintain its own workforce in that service area. We obtained $400,000 in monetary relief benefiting 100 persons.

Other Resolutions

EEOC v. County of L.A. - Subpoena Enforcement
EEOC v. City of L.A. - Subpoena Enforcement
EEOC v. International Brotherhood Teamsters Dairy Emp. - Subpoena Enforcement

MEMPHIS DISTRICT OFFICE

EEOC v. Rice Electric Supply -- This spousal benefits case resulted in a consent decree. Relief amounted to $2,429.

EEOC v. GMAC -- This was a Title VII discharge case. The charging party, a Black male, was summarily discharged from the position of Credit Representative and replaced by a white male. The charging party was the only black person employed in that position. The consent decree obtained here provided $20,500 in monetary relief.

EEOC v. Harvey Freeman & Sons -- This suit sought enforcement of a negotiated settlement agreement. Charging party had filed a charge alleging race discrimination because defendant fired her after learning she was married to a black man. That charge was resolved by settlement requiring charging party to be given the first available position as a resident manager. Charging party filed the charge on which this case was based when she learned that several positions had been filled by defendants and she had received no offers. The suit was resolved by a consent decree providing $8,000 in monetary relief.

EEOC v. Cirrus Flight Operations -- The charging party in this EPA-retaliation case was granted a TRO and settlement of $1,200.00 under a consent decree.

Other resolutions

EEOC v. GAIV - Subpoena Enforcement
EEOC v. W. A. Kreuger - Subpoena Enforcement
EEOC v. Lakeside Inn - Subpoena Enforcement

NEW ORLEANS DISTRICT OFFICE

EEOC v. Litton Industries -- This Title VII spousal benefits suit was resolved by settlement agreement providing $19,500 in monetary relief.

EEOC v. Auto-Comm Engineering -- This Title VII sexual harassment claim resulted in a settlement in favor of the charging party in the amount of $5,000 and forgiveness of a judgment held against her for $1,768.

EEOC v. South Central Bell Telephone Co. -- Charging party entered into a pre-determination settlement agreement wherein South Central Bell agreed to a monetary settlement (which was paid) and also agreed to revise charging party's personnel records to show that she had resigned. South Central Bell also agreed to give a neutral reference if employment inquiries were made of it concerning the charging party. South Central Bell breached the agreement by telling a credit bureau that charging party had been discharged and would not be rehired. As a result, charging party was denied employment based on the adverse information. Suit was filed when voluntary compliance was not achieved. The suit was resolved by settlement agreement providing $8,000 in monetary relief.

EEOC v. Timex Corp.-- This suit alleged that the employer unlawfully required persons receiving severance pay to waive their rights under ADEA. A consent decree obtained provided monetary relief amounting to $11,000 and ordered discontinuance of the waiver requirement.

EEOC v. Natural Gas Pipeline Co. -- The Commission brought this suit under the ADEA alleging that defendant's practice of retiring corporate aircraft pilots at age 60 was unlawful. The Commission obtained monetary relief via settlement agreement in the amount of $15,000 for 3 persons.

EEOC v. J. Ray McDermott -- The Commission intervened in this class action brought on behalf of all harassed by her supervisor and denied assignments to work at particular locations because of her sex. There was evidence to indicate that defendant granted its clients' requests not to send them black and/or female guards.

EEOC v. American Can -- This ADEA suit was resolved by settlement agreement providing $27,000 in monetary benefits for eight individuals who were forced to retire because of their age.

EEOC v. NBC -- This ADEA suit alleged seven individuals were denied the opportunity to transfer from their positions on the film crew to engineer positions. The suit was resolved when we were able to obtain a settlement agreement providing $10,000 in monetary relief.

EEOC v. Fairfield Management Association -- The Commission was able to resolve this individual sex-based discharge suit by settlement agreement for $750.

Other Resolutions

EEOC v. New York City Police Department	- Subpoena Enforcement
EEOC v. Holiday Inn. Cheektouaga	- Subpoena Enforcement

PHILADELPHIA DISTRICT OFFICE

EEOC v. New England Telephone & Telegraph -- A consent decree has been signed in this case. The EEOC had brought suit against the New England Telephone and Telegraph Company alleging a Title VII violation for failing to include in net credited service the time during which a female employee is absent by reason of a pregnancy related disability on the same basis as the defendant includes in net credited service the time a male employee is absent because of a disability. The decree also provides for the restoration of seniority following maternity leave. We estimate the decree will benefit more than twenty individuals to be determined during a posting period.

EEOC v. Borough of Coraepolis -- This ADEA suit alleged unlawful involuntary retirement. Charging party and one other employee were involuntarily retired because of their age and their eligibility for retirement benefits. A settlement agreement reached here provided $115,500 in monetary relief.

EEOC v. Newark Bd. of Education -- This was an ADEA suit in which we alleged that the charging party was denied health care benefits after he reached 65 on the basis of his age. The suit was resolved by a settlement agreement providing $4,000 in monetary relief.

EEOC v. North Stabane Twp -- This ADEA suit alleged charging party was unlawfully forced to retire because he had reached age 62. A settlement agreement was obtained providing $8,500 in monetary relief.

EEOC v. Miners Savings Bank -- Three female bank tellers were paid less than a male who performed teller operations. Defendant argued that the male was paid more because he was participating in a management training program. Evidence showed that there was no bona fide training program and as part of the settlement, defendant agreed to pay an additional amount (equal to backpay) in liquidated damages, for a total of $10,400.

EEOC v. Penncrest School -- This was an EPA suit. Charging party was denied the same salary as a male predecessor for work requiring same skill, effort and responsibility and performed within the same establishment under the same working conditions. We obtained judgment in our favor for $20,000 plus 7.7% post judgment interest.

Other Resolutions

EEOC v. Franklin & Marshall College - Subpoena Enforcement
EEOC v. American Society for Testing - Subpoena Enforcement

PHOENIX DISTRICT OFFICE

EEOC v. AT & T -- This was a class action brought against AT&T based upon the denial of reinstatement to females returning from maternity leave. Males returning from temporary disabilities were returned to their positions but females on maternity leave were returned only on the condition that a position was available. Approximately 50-75 females are to be compensated for the delay or denial of reinstatement from their leave. Monetary relief amounted to $150,000.

EEOC v. Metro Hotel -- The charging party alleged that because of her sex she was not hired as a bellhop. A discriminatory comment was attributed to a male hiring official. The Defendant claimed that because of her

SAN FRANCISCO DISTRICT OFFICE

EEOC v. Allstate Insurance Co. -- This case was an equal pay case brought under Title VII. The issue in this case was whether Allstate was paying a lower "guarantee" (i.e., guaranteed minimum salary) to females than to males for performing the identical job of Sales Agent. A sub-issue in this case was whether a person's prior salary constituted a valid "Factor Other Than Sex" within the meaning of the EPA. The suit was resolved by consent decree providing $5 million in monetary relief plus injunctive relief. An estimated 3,200 people benefited from the decree.

EEOC v. Pacific Southwest Airlines -- Suit was brought here to obtain preliminary relief (TRO and preliminary injunction) to prevent defendants' termination of 21 black skycaps. Defendant planned to replace skycaps with subcontract workers. The court ordered defendant to retain skycaps through the Commission's administrative process. The case was ultimately settled and skycaps will be permanently retained unless discharged for cause.

EEOC v. Pullman Power Products -- This case was brought on behalf of one individual female, alleging disparate treatment and retaliatory discharge. By the time the lawsuit was filed, the construction site had closed down; hence there was no injunctive relief available. The female victim had simultaneously brought a tort action against defendant while the EEOC was pursuing its Title VII action. Her tort action and Title VII action recovered $10,000, $2,500 of which represented her Title VII claim.

EEOC v. Southern Pacific -- This suit involved a Newport News spousal benefits issue. Defendant agreed to reimburse all male employees for the pregnancy disability expenses of their spouses and defendant has agreed to change its policy to conform with Title VII and the Newport News ruling. The decree is estimated to result in $2 million in monetary relief.

EEOC v. Tri Valley Growers -- This suit alleged that women were paid less for work identical to that performed by men. The case was settled for full back pay ($15,000).

ST. LOUIS DISTRICT OFFICE

EEOC v. Midwestern Distributing Company -- This suit alleged that Midwestern, a long-haul company operating about 800 trucks with two-person teams of

EEOC v. Automatique, et al. -- In this age and sex discrimination case the consent decree obtained enjoined the company from discriminating in assignments, promotions, layoffs, and other terms and conditions of employment. This plan covered both past, present, and future employees. Past and present employees were given past credited service.

EEOC v. Chippewa -- Defendant violated Title VII by discriminating against their pregnant employees in three ways: (1) they forced some pregnant employees to quit while they were still able to work, (2) they allowed only 2 weeks for a leave of absence, and (3) they excluded pregnancy costs from their group health plan. The suit was resolved by settlement agreement which included $7,000 in monetary relief.

SEATTLE DISTRICT OFFICE

EEOC v. Oregon State Department of Corrections -- The State of Oregon had maintained a policy of mandatory retirement at age 60 for all "public safety" personnel, including people working, for example, as librarians. EEOC brought suit on behalf of six identified individuals, brought about policy change and full relief for over $150,000 for affected persons.

EEOC and Idaho Human Rights Commission v. Banner County -- Charging party, filed an EPA charge claiming she was paid less as County Planning and Zoning Coordinator than male predecessors. We alleged she was fired as a result of her EPA complaint. Our lawsuit was filed jointly with Idaho HRC and private counsel who alleged state tort claims. The total EPA claims were $37,000 and the case settled for $83,000.

EEOC v. Burlington Northern, Inc.-- This was a national origin and retaliation case where charging party wrote a letter to a local newspaper criticizing BNI's treatment of Hispanics and Blacks. The company fired him for writing the article. Private attorney intervened in our action seeking additional tort damages. The company settled after the first day of trial for $79,500 which includes full back pay, plus interest.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, DC 20506

Office of the
Commissioner

April 14, 1986

Honorable Matthew G. Martinez
Chairman
Subcommittee on Employment Opportunities
U.S. House of Representatives
518 House Office Building Annex #1
Washington, DC 20515

Dear Chairman Martinez:

This letter is in response to your letter of April 4, 1986 in which you seek "to further clarify matters that came up in [my] testimony".

During the hearings, I set forth the basis for my change of view on the question of the use of goals and timetables. With the exception of the Stotts case which called into question the use of goals and timetables, my position is based less on case law than on the language of the statute, its legislative history, and the efficacy of goals and timetables as a remedy. My reasons, which remain unchanged, appear at pages 64 - 68 of the transcript of the March 11, 1986 hearings of your subcommittee and in my written testimony.

The remedial use of goals and timetables is not designed to make individual identified victims whole. Rather, they are designed to be used by an employer to measure its effectiveness in moving towards proportional representation. **Apriori**, a victim is asked to trade a job or promotion for a promise by an employer to make a good faith effort to hire or promote someone who shares a general characteristic, e.g. race, sex, or ethnicity, with them. Not only does this fall short of providing a meaningful remedy but, as the Supreme Court stated in Connecticut v. Teal, Title VII requires more.

> "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for **each** applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce" [emphasis in the original].

As I stated during the hearing, I have never spoken to a reporter from the Baltimore Sun. Therefore, I do not know why the newspaper "state[d]" what it did. My speculation as to the newspaper's basis for its story is set forth at page 63 of the hearing transcript.

The Commission has not addressed nor decided "whether it should seek relief for identified victims of discrimination only as opposed to class-wide relief."

Likewise, the Commission has not addressed nor decided "whether goals and timetables or other numerical remedies should be included in consent decrees or government prayers for relief."

As each Commissioner has made clear, the Commission is steadfast in its commitment to vigorously pursue pattern and practice charges. This commitment is evidenced by the percentage of our litigation which involves class action suits. What we are equally committed to is obtaining meaningful relief for those persons who are the victims of discrimination. This is consistent with the language of Title VII, its purpose and legislative history, the existing case law, and the historical mission of this Commission.

If you have any further questions about my testimony or my position on the issues which formed the basis for the hearing, please do not hesitate to write.

Very truly yours,

William A. Webb
Commissioner

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, DC 20506

Office of the
Commissioner

April 23, 1986

RECEIVED

APR 28 1986

SUBCOMMITTEE ON
EMPLOYMENT OPPORTUNITIES

Honorable Matthew G. Martinez
Chairman
Subcommittee on Employment Opportunities
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Martinez:

In your letter of April 4, 1986, you asked questions regarding my testimony before the Subcommittee on March 11, 1986. Herewith are my responses.

QUESTION ONE:

Your written testimony referred to a prohibition against racial preferences in Title VII statutes. Since affirmative action is proposed in cases of previous discrimination or adverse impact upon individuals, and so act as remedial solutions, how is this preferential treatment?

ANSWER:

The term "affirmative action" appears in Section 706(g) of Title VII, and refers, I believe, to affirmative relief for all victims of discrimination, such as reinstatement and backpay--relief to make victims of employment discrimination whole. Section 706(g) also gives courts broad remedial powers to require those who violate Title VII to take specific affirmative steps, such as expanded recruitment or removal of discriminatory barriers and their effects.

However, insofar as the term "affirmative action" is used in your question to mean the use of court-mandated quotas and goals and timetables that provide relief to classes of people based solely on their race or other group characteristics, I view this as constituting preferential treatment contrary to Title VII. I believe the goal of Title VII is not achieved through quotas and goals and timetables that treat members of certain races or other groups as fungible beneficiaries of advantageous treatment. Rather, the remedial goal of Title VII is to provide affirmative relief to individuals or groups of individuals who are the actual victims of discrimination, and to change employers' policies and practices to ensure that discrimination does not occur in the future.

QUESTION TWO:

In your interpretation of the Stotts case, you stated that preferences are not required nor permitted under Title VII. However, in the case language on Stotts, doesn't the Court refer specifically to actual victims of discrimination under a seniority system? Title VII prohibits discrimination in the first place, and the remaining language of Section 706(g) gives courts power to order "such affirmative action as may be appropriate." How then do you interpret that this restricts remedies taken against discriminating officials? Cite specific cases where goals and timetables have acted in the ways you have described.

ANSWER:

In my testimony I stated that my reading of Title VII and its legislative history led me to conclude "that these laws neither require nor permit the Commission to impose preferences based on race, color, religion, sex, or national origin." I then went on to say that "[t]his view is set out in sections 703(j) and 706(g) of Title VII and is consistent with the recent decision of the Supreme Court in Stotts." The Supreme Court in Stotts did refer to actual victims of discrimination under a seniority plan. 104 S. Ct. at 2587-89. My views on the "affirmative action" language in Section 706(g) are set forth in my answer to the question above. I certainly do not interpret this provision as restricting remedies against discriminating officials. As the Commission stated in its remedies policy adopted on February 5, 1985, when "a particular supervisor or other agent of the respondent is identified as knowingly or intentionally being responsible for the discrimination that occurred, the respondent must be required to take corrective action." Such "corrective action" potentially includes removal of the "offending individual from personnel authority" (see enclosed EEOC Policy Statement on Remedies And Relief For Individual Cases Of Unlawful Discrimination, February 5, 1985, page 4).

Our remedies policy also mandates that we vigorously seek to make all identified victims of discrimination whole, an outcome which stands in stark contrast to what frequently happens when quotas, goals, and timetables have been sought as remedial measures. For instance, in Local No. 93, International Association of Firefighters v. City of Cleveland, the Supreme Court is reviewing a case in which goals and timetables (which in this case certainly operated as quotas) were granted as relief instead of jobs, back pay and action against discriminating officials. Similarly, in Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission, the quota requirement originally imposed had no remedial effect on the discriminating officials themselves, nor did the amended prospective relief. These cases demonstrate the inadequacy of quotas and goals and timetables as remedial relief; the Supreme Court will soon rule on their legality.

QUESTION THREE:

Has the EEOC held any meetings to discuss the issue of whether it should seek relief for identified victims of discrimination only as opposed to class-wide relief?

ANSWER:

No.

If so, when were they held, what was the substance of your decisions, and were the meetings open to the public?

ANSWER:

Not applicable.

Were decisions made in the course of specific adjudicatory proceedings? When were they, and how did you come to such a decision, through notation voting, through deliberations and voting by the Commissioners, or by some other means?

ANSWER:

Decisions as to whether to seek relief for individuals or to expand our suits to class cases are made in closed sessions in connection with decisions to litigate particular cases. These are not actually adjudicatory proceedings but part of our ongoing prosecutorial responsibility which we fulfill both by notation voting and in meetings.

QUESTION FOUR:

Have any similar actions been taken on the issue of whether goals and timetables or other affirmative action remedies should be included in consent decrees or government prayers for relief? Please respond to this issue as in the questions above.

ANSWER:

We do not discuss or vote on consent decrees. Government prayers for relief are occasionally discussed in the context of individual cases in closed sessions when we authorize litigation.

Sincerely,

R. Gaull Silberman

R. Gaull Silberman
Commissioner

Enclosures (2)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

April 11, 1986

Honorable Matthew G. Martinez
Chairman
Subcommittee on Employment Opportunities
Committee on Education and Labor
House of Representatives
Washington, D.C. 20515

RECEIVED
APR 1 [illegible] 1986
SUBCOMMITTEE ON
EMPLOYMENT OPPORTUNITIES

Dear Chairman:

This is in response to your April 4, 1986 letter requesting clarification regarding the use of goals and timetables in EEOC enforcement activities. My response to the questions posed by your letter are as follows:

#1. No.

#2. No.

#3. See answers to questions #1 and #2.

#4. See answers to questions #1, #2, and #3.

#5. This question asks for my interpretation of Title VII It also asks what is the difference between make whole and prospective relief. As you know, Title VII is a very complicated statute, involving many provisions. Your request that I give my interpretation of Title VII without referring to a specific provision, is simply too broad and vague to permit a meaningful response. The second part of the question pertains to relief. By definition, make whole relief is relief designed to restore a victim of discrimination to the position he/she would have been in if he/she had not been discriminated against. In other words, it's to put the individual in his/her "rightful place." Prospective relief is generally understood to include relief designed to insure that future employment practices will comport with the law. Such relief may or may not include make whole relief (e.g. retroactive seniority). Typically, however, one thinks of goals and timetables as prospective relief, though any relief that looks toward the future would be prospective relief, including some kinds of make whole relief.

Honorable Matthew G. Martinez
Page two

#6. It is my personal view that goals and timetables are a permissible remedy in appropriate cases provided they are not misused.

If I can be of further assistance, please let me know.

Sincerely,

Johnny J. Butler
General Counsel (Acting)

The
Catholic
University of
America

The Columbus School of Law
Founded 1895
Washington, D.C. 20064
(202) 635-5140

April 17, 1986

Congressman Matthew G. Martinez
Committee on Education and Labor
U.S. House of Representatives
518 House Office Building Annex #1
Washington, D.C. 20515

Dear Congressman Martinez,

In response to the questions you propounded in your letter of April 4, 1986. I think the following is the best statement of Affirmative Action to date:

While the U.S. Supreme Court has not directly addressed the issue, the bulk of the Courts of Appeals have affirmed cases in which affirmative action hiring for minorities or females has been adopted, without any showing that they were all previously defeated applicants (i.e., "actual victims").

The rationale behind prospective relief for non-victims is that Title VII is not designed solely for punishment of an employee or merely for recompense to prior victims, but is designed to achieve as speedily as is possible, the complement of minority or female persons in an employer's work force, who would have been there absent the prior discrimination. The discrimination has acted as a barrier to plaintiffs and members of their group as a class and thus the relief should be on behalf of that class.

I believe the General Counsel is subordinate to the E.E.O.C Commissioners as regards the development of policy. Where he is unclear about that policy, he should seek clarification, and not proceed under some unilaterally adopted definition of that policy. The Commission meets so there is ample opportunity to seek and secure their policy input.

Congressman Matthew G. Martinez
April 17, 1986
Page 2

The oath of office which the General Counsel takes, mandates that he faithfully execute the laws. If he can not countenance their faithful execution, he should resign. There is room for disagreement by the Commission with the posture of the lower courts until the U.S. Supreme Court has finally spoken, however the arena for that disagreement should be substantially reduced when there is virtual unanimity by all courts on a given issue. That I believe, is the use regarding the lawfulness of affirmative action relief.

Yours truly,

Leroy D. Clark

Leroy D. Clark
Professor of Law

LDC/lt

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S POLICIES REGARDING GOALS AND TIMETABLES IN LITIGATION REMEDIES

THURSDAY, MARCH 13, 1986

House of Representatives,
Subcommittee on Employment Opportunities,
Committee on Education and Labor,
Washington, DC.

The subcommittee met, pursuant to call at 9:30 a.m., in room 2261, Rayburn House Office Building, Hon. Matthew G. Martinez (chairman of the subcommittee) presiding.

Members present: Representatives Martinez, Hawkins, Hayes, and Gunderson.

Staff present: Eric Jensen, staff director; Valerie White, legislative assistant; Jefferson Fox, assistant minority counsel; Mary Gardner, minority legislative associate.

[Opening remarks of Hon. Steve Gunderson follow:]

OPENING REMARKS OF HON. STEVE GUNDERSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

Good morning. I want to take this time to welcome former EEOC Chairpersons Eleanor Holmes Norton, William Brown, III, and former General Counsel, Mr. Leroy Clark as well as to welcome our other expert witnesses here to testify before us today on the Equal Employment Opportunity Commission's use of goals and timetables. We appreciate your willingness to participate in this morning's hearing, sharing your expertise with interested Members of the Subcommittee.

In previous hearings I have defended the EEOC's right to consider making changes in past Commission policies, representing this Administration's views in enforcing our Nation's Equal Employment Opportunity laws, provided of course that these changes be made with the input of interested parties outside the Commission. I have always, however, stressed that should the Administration or any of its agencies actually make formal changes in its policies that would exclude the use of goals and timetables in providing remedies for discrimination or in enforcing those laws -- I would express my concern loudly over such changes. In fact, I would be apprehensive over any policies that would exclude the use of statistical data in determining discriminatory practices or in providing remedies when it has been proven that discrimination has taken place.

We are here this morning to determine whether or not such changes in policy are actually being initiated at the EEOC, either formally or informally, and if they are, to determine how these changes affect the Commission's efforts to enforce the Nation's equal employment opportunity laws. We are also here to ascertain whether or not there are any other effective enforcement tools which can be used in place of goals and timetables should the Commission actually move away from their use.

This is a very emotional issue over which many are understandably very frustrated and upset with reports that the Commission is no longer considering any remedies that include these measures. However, in testimony provided on Tuesday before this Subcommittee, Chairman Thomas, individual Commissioners, and the Acting General Counsel of the EEOC informed us that they had not made such formal policy decisions. We did learn however that the decision to suspend the use of goals and timetables had been made at the Commission by the General Counsel's Office, defined by witnesses as a management decision. This action, in and of itself, is controversial. I am interested in hearing the opinion of our witnesses as to whether or not they feel that the General Counsel of the EEOC should wield this sort of authority.

Several of Tuesday's witnesses did indicate however, that they feel goals and timetables to be ineffective and subject to abuse. We would like to learn today's witnesses' views on this question as well.

Again I thank you for participating in today's hearing. I look forward to hearing your testimony and to the opportunity of asking you further questions as we proceed.

Mr. MARTINEZ. Call the meeting to order. This morning's hearing on the Equal Employment Opportunity Commission's policies on goals and timetables is a followup of Tuesday's hearings where we had the EEOC Commissioners and acting general counsel before us.

Today, we will hear from former EEOC Commissioners and general counsel, and other former EEOC officials to determine whether the current EEOC debate and actions are contrary to the enforcement mandate of the Commission as originally enacted.

As you are all aware, since this administration has taken over, the EEOC under Chairman Clarence Thomas and current Commissioners, has begun a steady erosion of past EEOC enforcement policies. More importantly, key civil rights laws and regulations are now being questioned and are on the chopping block for major revisions which would, in my opinion, gut their effectiveness.

This effectiveness has proven itself over the past 20 years in being able to integrate the private workforce of our Nation, while giving employers guidance on how to overcome troublesome discrimination suits. I think with the thrust of the Commission today, they ought to realize that it's equally important to provide employers with the opportunity to avoid troublesome discrimination suits.

We are honored to have here today the Honorable Eleanor Holmes Norton and William Brown III who will grace us with their esteemed views of previous EEOC policies and tell us where the current EEOC policies are taking us.

Chairman Hawkins, do you have a statement?

Chairman HAWKINS. No statement at this time. Thank you.

Mr. MARTINEZ. At this time, I would like to call Eleanor Holmes Norton and William Brown III. Eleanor Holmes Norton as she is coming up is professor of law at Georgetown University. William Brown III is from Schnader, Harrison, Segal and Lewis, Philadelphia, PA. Ms. Norton, would you like to start?

STATEMENT OF ELEANOR HOLMES NORTON, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY

Ms. NORTON. Thank you, Chair Martinez, Chair Hawkins. It is unusual for this committee to ask former officials of the Equal Employment Opportunity Commission to testify before you, especially former EEOC chairpersons, and it is equally rare, if not unprecedented for you to require all five Commissioners and the general counsel to appear, as you did earlier this week.

I testify today at your request out of respect for the work of this committee now and over the years and out of concern about the issues that have occasioned this extraordinary set of hearings. I commend the committee for its nonpartisan, if unflinching oversight of the EEOC. In this respect, you, Chair Martinez, and your colleagues in both parties have pursued your mission with the objectivity that is necessary to uncover the facts, but with the determination that is vital if the law is to be enforced.

In this way, if I may say so, you continue in the tradition of the former chair of the subcommittee and now chair of the full committee. I can testify from personal experience that when the committee chair sat in the subcommittee chair during my term at the EEOC, he never spared me criticism or oversight. He and I both understood that this is the way it must be in an open government, and I was a better public official for it.

I would like to take note at the outset that my testimony is to be followed by that of a distinguished former chair of the Commission, William Brown III, who so ably led the Commission during a Republican administration. I do not know what Bill Brown intends to say to you, because I have not spoken with him before greeting him here this morning. I do know what his record was at the Commission. I am familiar with the record of all of my predecessors. Though we were of different political parties, in the administration of the law, there simply is no difference among us. I was preceded by three Democrats and three Republicans.

As I have done in the past, I wish to acknowledge today their important contributions to the Commission and to the development of antidiscrimination law. By the time I came to the Commission, I found a strong statute which these predecessors and their Commissioners had taken leadership in developing. Franklin D. Roosevelt, Jr., Steve Schulman, Clifford Alexander, William Brown III, John Powell and Lowell Perry, three Democrats and three Republicans who preceded me, left me a proud nonpartisan legacy of strong law enforcement. I regret that this tradition has now been broken.

Nothing symbolizes this break better than the Commission's attempt to abolish goals and timetables secretly, and then to allow a civil servant who is acting general counsel to assume full responsibility for a policy shift of such major proportions. In my experience at the Commission, not even a Presidential appointee, as general counsel, much less an acting general counsel, could have changed longstanding EEOC policy in this way without specific instructions from the Commission by a majority vote.

Indeed, even as chair, with sole administrative authority over the operations of the Commission, I did not have the authority under law to act unilaterally and orally to change Commission policy of this or any magnitude whether expressed through guidelines, compliance manual or positions that the Commission took in court cases, or in any other way.

Indeed, as part of our reorganization of the Commission, we created a new Office of Policy Implementation specifically to involve the Commissioners and their staffs, not only in policy decisions, but in policy development from the beginning.

To be sure the statute at Section 705 makes the chair, quote, "responsible on behalf of the Commission for the administrative operations of the Commission," end quote, but as a matter of law, neither I nor the general counsel were at liberty to change existing policy without a vote of the Commission, and in my view, the same is true of the law today, nor does it matter when, in what form or in what administration the policy first arose. Policy remains policy until it is affirmatively, legally, and publicly changed. Change of policy without vote of the Commission or even in this case so much as notice to the public prejudices the rights of affected individuals.

It is plainly unauthorized by law. The characterization as prosecutorial discretion of the elimination of goals and timetables would be ludicrous if it were not so disturbing and lawless. If the general counsel can decide or surmise on his own that he should stop enforcing goals and timetables, why can he not pass oral in-

structions to regional attorneys on other policy matters encompassed in litigation, for example, to cease bringing cases of sexual harassment if he thinks or surmises that the Commission may be believe that such cases are inappropriate under the statute although no vote has been taken.

If prosecutorial discretion can intrude into policy matters in so large a fashion, what is to keep the general counsel from whispering down the line that only cases involving intentional discrimination are to be sent forward to headquarters. The prosecutorial discretion rationale offered for the secret changes in Commission policy on goals and timetables is not only incredible on its face, if the Commission operates in this fashion, it is dangerously outside of the law in at least two respects.

It is in violation of section 705(a) which entrusts, quote, "five members, not more than three of whom shall be members of the same party," end quote, with the policy making functions of the Commission, and it is in violation of the rights of present, past and future charging parties and affected class members who have been deprived without notice of the prevailing remedy which is part of the full relief to which they are entitled under existing precedents.

The prosecutor, here the general counsel, is not a policy maker. He carries out the policy of the Commission. Prosecutorial discretion does not give him a writ to create policy. Prosecutorial discretion must be exercised within the bounds of existing policy and that policy can be made only by the Commission. Indeed, even the Commission itself cannot change policy in the secret manner employed here.

The elimination of goals and timetables and the strained rationale offered are not isolated occurrences. They are part of a much larger policy and practice of extreme retrenchment in enforcing the law on the one hand and doublespeak claims of heightened law enforcement on the other. However, claims of hardnosed enforcement of the law have fooled no one from this committee nor the public interest groups that monitor the Commission. The Commission has been uniformly criticized for abandoning the commitment and the practice of strong enforcement carried out by each and everyone of its predecessors.

As criticism of the Commission has heightened, its defensive claims of tough enforcement have grown more shrill and transparent. Part of its pattern of disinformation has been to attribute its problems to others including my administration. Until recently, I have foregone public criticism of the Commission. I have resisted countless requests and opportunities to comment publicly on the work of the Commission. Just as my work has been judged not by my predecessors but by disinterested observers in the public, business groups, public interest groups, congressional committees, the press, so I thought should the work of the present chair and Commission.

However, as evidence began to emerge that the chair and some of the Commissioners were citing my administration for problems in theirs and of their own making, I had no choice but to speak publicly. Even if it were true that I had passed on problems to them, surely after so much time in office, the chair and the Commission should have repaired them or at least by now be willing to take responsibility for how the agency is administered today.

Despite a plethora of problems I inherited, I took full responsibility for the problems of the agency as soon as I took office. When I came to the EEOC, I found an agency that had been without permanent leadership for many months and had thus lost its credibility with the public.

The easiest thing in the world would have been to blame my predecessors. I did not consider that an honorable or an honest course. It seemed to me that such criticism from me sallying forth as hindsight was hardly fair comment. There has been so much unfair comment from the chair of the Commission and occasionally from one or two other commissioners, that I would like to say a word to set the record straight, particularly since the claims made illustrate the same pass off of responsibility that is evident in the handling of the goals and timetables issue.

Claims have been made that the Commission gets full relief for complainants today while we settled cases for little. Today, the Commission litigates, while before it settled cases rather than go to court. These are not mere distortions or routine puffing. They amount to a deliberate fabrication of the record designed as a distraction from the uniformly poor statistical indicators of the present administration.

I will not rely upon self-serving statements about my record of the kind we have heard from the chair of the Commission. Instead, I would like to enter into the record a report I recently received in the mail from an independent public interest group, Women Employed. I hope that the members of this committee have also received and will have an opportunity to scrutinize this report.

Women Employed was a tough monitor of EEOC operations before I came, while I was in office and continues in this role. Using the Commission's own performance statistics and policy directives, as well as interviews with private attorneys who use the Commission, the report concludes, and I quote, "The strong emphasis on fair settlements, rapid resolution of charges and the commitment to strong enforcement that existed during the Carter administration has been replaced by inaction, incompetence and hostility toward victims' rights."

Women Employed found that EEOC is back down to a settlement rate of 14.4 percent which is back where it was when I first came to the Commission. This is especially serious, since in an administrative process with tens of thousands of complaints each year, the settlement rate is, in effect, the remedy rate.

As this committee knows, the settlement rate was brought up to a high of over 40 percent during our term at the Commission. The combination of a low settlement rate and a huge reduction in litigation in the past 5 years has been devastating for charging parties. Women Employed found that, and I'm quoting, "currently over 56.2 percent of all new charges filed are determined no cause by the EEOC compared with 28.5 percent of the cases filed 4 years ago," when our systems were still in place.

To divert attention from these statistical realities, the Commission has claimed that instead of settling complaints, it has been demanding full relief from employees to the benefit of charging parties, a claim that is belied by the Commission's own statistics now made public by a public interest group that had to file Freedom of Information Act complaints in order to get information which we published every 2 months while I was in office.

The Women Employed report found that our use of negotiated settlements had both enhanced the rights of charging parties and made the process more efficient, and I quote them. "By 1980, the EEOC settlement rate was over twice the rate for 1976, and the average time for processing a charge had dropped from 24 months in 1976 to between 3 and 6.5 months in 1980. The backlog of cases decreased from 130,000 cases in 1976 to 37,675 cases in 1980."

This assessment is confirmed by the 1981 comprehensive GAO report of the changes we made at the Commission. The GAO found, and I am quoting, "The EEOC has made many significant improvements in its procedures and practices since 1976 that increase its ability to attack employment discrimination. EEOC's organizational changes go a long way toward addressing its past problems and enabling it to enforce title 7 effectively," and it found, and I'm quoting again, "Perhaps EEOC's most important change since 1976 was the introduction of a rapid charge process to resolve new individual charges."

Women Employed reports that the shift in emphasis from negotiated settlement to a demand for full relief in every case, and I quote, "destroys the climate necessary for settlement and has the effect of providing remedies for fewer victims of discrimination." As evidence, the report relies on the EEOC's data showing that in the first half of 1985, only 2,964 victims of discrimination received monetary benefits compared in 1980 to 15,328 individuals. The spectacular difference between Commission claims and Commission results in charge processing is consistent with the attitude the Commission has demonstrated on goals and timetables.

In charge processing, the Commission has never announced its statistical results, but instead has actively concealed them under get tough rhetoric. On goals and timetables its acting general counsel is encouraged or allowed to orally pass down the line a major policy change allowing the Commission to avoid facing up to its responsibility as mandated by law. The insults and injury to the public is compounded by the fact that the public is deceived into believing that no change has taken place. The illusion of an unchanged policy on goals and timetables at the EEOC has been reinforced by the fact that in the two agencies where this precise change is being proposed or implemented, the Justice Department and the OFCCP, their has been public notice, and open debate.

Despite my strong disagreement with Assistant Attorney General Bradford Reynolds on goals and timetables and many other of his policies, he has always moved openly to change policy and thus has not compromised his own integrity nor that of the department. No such candor has been apparent from the Commission on the goals and timetables issue or on many other issues.

Another serious example is the Commission's claim that it will get full relief for complainants or it will litigate. Its action to litigate many individual cases has nothing to do with tougher enforcement as it is claimed. It is a response to a chronic litigation shortfall that began in fiscal year 1982 when the Commission's litigation program was effectively destroyed by a combination of actions of the general counsel and the Commission in refusing to bring forward and then approve many cases of the kind the Commission had prosecuted in the past.

The result was a 74 percent drop in litigation that the Commission has not moved effectively to correct. After continuous criticism from this committee and from the public, the Commission has moved in desperation to increase the number of cases to be litigated by any means necessary. The Women Employed report says of this effort, and I quote, "Recently the EEOC launched a public relations campaign to tout its increased litigation activity claiming that the Commission filed 411 cases in 1985. However, this claim is highly inflated. In fact, 125 of these so-called cases are subpoena enforcement actions which are legal techniques used to obtain information and access to employer records. It is misleading to compare the number of cases filed in 1985, including subpoena enforcement action, with the numbers filed in previous years that do not include such actions."

When a public agency obfuscates and distorts its record in this way, it cannot be surprising that it would conceal a major policy change that it believes would be unpopular with the public. I hope this committee will cut through this pattern and insist that the Commission conduct itself openly and honestly in all its operations.

The policy of distortion continued in the testimony you heard earlier this week, for example, the chair in criticizing goals and timetables implied that those who relied on goals and timetables substitute them for the action of, quote, "truly providing equal opportunity," end quote. We and others who use goals and timetables used them to monitor changes in practices, not to replace reformed employment practices.

This is especially the case at the EEOC where charges and cases are brought in response to grievances about practices. Without goals and timetables, there is simply no way to know whether changes in practices are eliciting results for minorites, women and others, or indeed whether changes in practices have occurred at all. This is an especially important point, I believe.

Without the use of goals and timetables as prospective relief, there would be no relief at all in many cases. By the time a class case is resolved, years have passed, and what individual victims there were have often scattered or found other jobs. The courts have been moved to order goals and timetables prospectively in part, because the employer in many cases would otherwise be subject to virtually no remedy at all.

Exclusionary practices may have been shown, but the victims of back pay are hard to find and identify, thereby artificially reducing the employer's liability as well as his need to remedially fill positions. In such instances, the courts as well as the EEOC are put in the position of finding violations with no assurance that they will be remedied. Prospective goals and timetables monitor the effectiveness of the remedy. Indeed, without goals and timetables, I am at a loss to understand how one would know that a remedy was working successfully at all.

The fact is that the EEOC's secret goals and timetables policy is linked to other policy changes including the view that only identifiable victims should benefit from enforcement of the EEO laws. During the first term of this administration, the EEOC seemed to resist such radical departures from existing precedent, but during the second term of the Reagan administration, it has more than succumb to pressures to bring the EEOC into line with extremist views on discrimination law. The result has been a loss in remedies for charging parties, and an efficiency and effectiveness for all concerned.

This state of affairs is not likely to be corrected from within the administration. This makes your oversight all the more important. These hearings have already done an important public service by requiring a public explanation of a major policy change the EEOC had tried to keep secret. With your leadership and oversight, I believe that this policy and others that seriously erode rights and remedies for charging parties can and should be change. Thank you very much.

Mr. MARTINEZ. Thank you very much.

Mr. Brown. Before you start, Mr. Brown, let me announce that Mr. Leroy Clark, former general counsel for the EEOC, has joined the panel, and thank you for coming. Go ahead, Mr. Brown.

STATEMENT OF WILLIAM BROWN III, SCHNADER, HARRISON, SEGAL & LEWIS, PHILADELPHIA, PA

Mr. BROWN. Mr. Chairman, I do not have a prepared statement this morning. I greet you and former Chairman Hawkins of this subcommittee. I would like to say, however, that I have a continuing interest in this area, ever since the time I first became the Chairman of the Equal Employment Opportunity Commission in April 1969. My period as Chairman lasted until December 1973.

While I am pleased to appear here before you this morning, I am really disturbed that such a hearing as this is even necessary. I say that particularly in light of the fact that last year I appeared before the Government Activities and Transportation Subcommittee of the Committee on Government Operations which is chaired by Chairwoman Collins. At that particular time, I joined in supporting Chairman Thomas' request that the head of the National Endowment for the Humanities, now the Secretary of Education, Mr. Bennett, be required to supply to EEOC under the directives their goals and timetables for that agency. His position at that time as I understood it was that goals and timetables were, indeed, appropriate, that the failure on the part of the Chairman of the National Endowment for the Humanities to supply that information to EEOC was atrocious and should be immediately corrected, and I supported that position.

I am quite disturbed to learn that in some almost clandestine way, he, along with other members of his administration at the Agency, have now attempted to eradicate many of the changes and the significant advancement which I believe have occurred only because of the fact that goals and timetables have indeed been required. There is no question in my mind that they work appropriately, and I say that to this committee this morning, currently representing primarily major employers in this country, employers who have in the very beginning resisted the setting of goals and timetables, who have now come to realize that in their own employment situations, goals and timetables are indeed appropriate ways of measuring the amount of progress which has been made.

I can tell you, having spoken with many of the chief executives of many major corporations that they are at a complete loss to understand the type of signals that are being given from this Administration and indeed from the Commission itself.

Those of us who are in government should indeed be leaders when it comes to the question of equal employment opportunity, and we should not be indicating by any means the fact that we're not going to be vigilant in requiring that people obey the law. I would have to say to this committee that the position of the current chairman of EEOC is most foreign to me.

As Ms. Norton has indicated, there has always been a bipartisan approach up until the current time in terms of enforcement of the law. I would certainly hope that that type of bipartisan support would continue, that the work of this committee be made much easier in terms of the types of enforcement that we have a right to expect from a major agency in the Federal Government and which has a responsibility in this area.

I thank you.

Mr. **Martinez**. Thank you, Mr. Brown.

Mr. Clark.

STATEMENT OF LEROY CLARK, FORMER GENERAL COUNSEL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Mr. **Clark**. Thank you for the opportunity to speak to the questions which the committee is facing today. I was the general counsel for the Equal Employment Opportunity Commission for approximately 2 years during the Carter administration under the leadership of Eleanor Norton who was chair at that time, and I have continued a study of employment discrimination laws, as a coauthor of a textbook in the area, and a teacher of the course in employment discrimination law at Catholic University, and also as a consultant to various civil rights organizations.

I would like to comment briefly on my view of the lawfulness of affirmative action as a remedial measure under title VII of the 1964 Act, and more expansively on the proper relationship of the general counsel of the Commission regarding the adoption of new policies.

First, my reading of title VII is that utilization of goals and timetables for the integration of an employer's work force by race, sex or national origin, after a finding or assessment that discriminatory practices or policies have been operative in the past, is both lawful and sound policy. There is nothing in the legislative history of title VII which mandates the utilization of ineffective remedies. The adoption of goals and timetables under title VII does not occur in a vacuum. It occurred rather against a long history of Federal Executive orders for two decades and the experience under many State antidiscrimination laws beginning in 1945 that a mere prospective command to employers to hire on a nondiscriminatory basis was inefficacious.

Studies of the discriminating employers years after such commands often showed the work force was devoid of minority persons, as before the command. There were reasons for this result. Often an employer may have generated a public image of not desiring minority employees, and that reputation continued to act as a deterrent to minority persons even after a prospective nondiscriminatory order was handed down, if indeed they ever learned of it.

Minorities looking for jobs wanted jobs, not litigation. Affirmative action does nothing more than place the burden on the employer to dispell that reputation by visible deeds of hiring qualified minorities within a set timeframe. The goals and timetables are not rigid. If an employer can reasonably explain the bases upon which he has not met those goals and timetables, that is accepted by every Federal Agency in the past that has administered them. It does not require hiring the unqualified. That claim floats around in many of the criticisms of affirmative action. That is absolutely not a part of what employers are required to do under affirmative action.

The courts, as well as the EEOC during my tenure they were sensitive to the tension in terms of equal opportunity for persons in majority groups that affirmative action created. Therefore, the courts when they dealt with affirmative action have always put an end point on it. There is a point at which affirmative action pressure ends, and even during the period in which an employer is operating under affirmative action requirements, majority group members are not totally excluded from hiring or promotion.

Let me move, however, to the second issue, namely the role and scope of authority of the general counsel. I am not sure I have a clear fix on the exact position of the current Commissioners at the Equal Employment Opportunity Commission, but as I read the testimony of Chairperson Thomas, it appears that they have not formally reversed prior EEOC policy that goals and timetables are lawful, but it appears that the Acting General Counsel has apparently, without any direction from the Commission, ordered his staff lawyers not to request such relief in any further litigation. It is my view that the general counsel, while a Presidential appointee who does not serve merely at the pleasure of the chairperson has as the statute says, quote, "responsibility for the conduct of litigation," close quote.

Other sections of the statute, however, clearly lodge the development of interpretive policy in the Commission. The Commission is the body which has prime authority for interpreting title VII for other Federal Agencies, for example, not the general counsel. Under section 713(b), the statute exempts a defendant from money damages if that defendant has relied on, quote, "a written interpretation or opinion of the Commission," close quote. Defendants have always known that reliance on an informal opinion from the general counsel does not provide the same protection.

In short, policy development is the province of the Commission. The strategy and tactics of litigation is the province of the general counsel. In my practice as general counsel, I scrupulously submitted all questions of policy to the Commission for their decision. I would inform them of the parameters of the law and any attendant legislative history on the issue, but there were often ambiguities there which did not fully and conclusively resolve the issue. In other words, there was always in many instances room for discretionary judgment, policy judgment and that was in my view the province of the Commission.

Whether or not to continue to pursue affirmative action in the arsenal of remedial matters in all future cases would seem to me to be a policy question of the first order. It is not one which I believe the general counsel has authority to adopt without full considered formal Commission approval.

For the general counsel to have the authority evidenced by this current posture of the acting general counsel is my view that the Commission would be reduced to mere housekeepers, shelling out money, making low level administrative and staffing decisions, but without the reins of true leadership which I think the statute envisions. Thank you.

Mr. MARTINEZ. Thank you, Mr. Clark. I have an immediate question for you as a former general counsel and as an attorney. Since you appointed a body to administer a law, and you set the policy by which that law would be administered, does policy in some way have the effect of law?

Mr. CLARK. Most certainly. I think that you see an interaction between the legal questions and the policy questions. They're not entirely separate. All I'm saying is that when the Congress passes a statute, as is true in many other areas, they will resolve many very obvious questions. However, there are frequently gaps, ambiguities, unresolved questions, questions which the Congress didn't anticipate.

The courts need guidance on those questions, and those are questions which I would denominate as policy questions. In other words, the Commission has to make a judgment as to what is the sound direction in which to proceed. I can give you an example of one matter that I thought was a policy question for the Commission when I was general counsel.

There was a question about whether an employer, after having been found liable under title VII, could turn around and sue a union under what was called a theory of a right of contribution after the matter had been litigated fully.

Now when you looked at the legislative history, it was very unclear. The Congress had never really directed itself in any great specificity to that question. I presented to the Commission what I thought was there in the legislative history that informed the question one way or another, but I pretty basically told them that they had to make a judgment as to whether they thought a right of contribution against unions was efficacious in terms of the best way to enforce title VII. There were arguments on both sides. The Commission resolved that matter, resolved it in a manner which the Supreme Court subsequently approved, but there was a legitimate policy question there in which I would have been usurping their authority to decide myself.

Mr. MARTINEZ. So at least in your opinion, as you've explained it, the Congress although established the thrust of how they wanted to alleviate discrimination in their plan, by mandating certain things in the law, but other things they mandated to the Commission to decide, because those would be things that arose after reasonable application. When those policies were decided by a vote of the Commission, and that became policy, then in your opinion that, in effect, did become the law?

Mr. CLARK. Well, what it becomes is a guide to the courts. In other words, the courts, as they have said, will give great deference to the policy intepretations of the Commission. It is the courts that ultimately make it law, but they do give some deference to those policy judgments by the Commission.

Mr. MARTINEZ. But as far as the Commission is concerned, until the court would decide otherwise, they would proceed as if that were the law by which they were acting.

Mr. CLARK. Right.

Mr. MARTINEZ. All right, and in that term then, I think Eleanor Norton, professor, has indicated in her testimony that there was a policy decision made by the Commission at the time, and that policy decision, I imagine, is recorded somewhere, is it not?

Ms. NORTON. The Commission had occasion to discuss goals and timetables very thoroughly, because it inherited the responsibility from the Civil Service Commission, the old Civil Service Commission, for the rights of Federal employees, and the question arose whether or not we should mandated goals and timetables in the affirmative action plans of Federal agencies, and unanimously the decision was that we had to do that, that that had come to be a standard part of affirmative action and that we did not think we had any choice but to use goals and timetables. We believed that that was in conformance with 707 as passed by the Congress.

Mr. MARTINEZ. And there was a vote on it?

Ms. NORTON. There was a vote on the use of goals and timetables as part of the vote on how to effect affirmative action plans in the Federal sector, yes.

Mr. MARTINEZ. That vote then established the policy?

Ms. NORTON. Yes, it did.

Mr. MARTINEZ. And so in the general counsel's mind, since that now had been established as policy, it would take another vote, right, to negate that?

Mr. CLARK. Yes, I believe that the only way that the general counsel could now relinquish the use of affirmative action remedies is if the Commission votes in the formal process of open hearing, inviting comment and a formal vote that is recorded to deliberately reverse that policy.

Mr. MARTINEZ. So then my next question is what would happen if the Commission now, were forced to make a vote to reaffirm or deny their current stance? In their testimony, we tried to get them to make definite statements one way or the other, which is almost impossible to get them to do. Should we force that point? And if they do decide to take a vote, and they reject timetables and goals, what do you think the Congress should do? How do you think the Congress should react to that?

Mr. CLARK. As I said earlier in my testimony, I think goals and timetables are now permitted by the law, and I also said that I thought it was sound policy. I would simply think that the Congress ought to vote to reverse that if the Commission took that stance.

Mr. MARTINEZ. Mr. Brown.

Mr. **Brown**. Let me just say that I agree with Mr. Clark. Clearly, the courts, including the Supreme Court have spoken out on this time and time again. They have approved the use of goals and timetables. When I was there at the Commission, the general counsel became for the first time an appointee of the President, so I have a pretty good insight as to the powers that the general counsel has.

Indeed, the original proposal, as you might recall, was to make the general counsel of EEOC a much stronger general counsel, giving to that individual almost the same types of powers as the general counsel at the National Labor Relations Board. When I found that out, I said to the people who were around me that I would not become the chairman of a group of individuals without any power. If all the power was going to reside in the general counsel; there would be no need to have the Commission nor a Chairman of that agency. We were successful in changing that in the Congress, and there's no doubt in my mind whatsoever that the general counsel reports to the Chairman and has limited powers.

It is the responsibility under the law for the Commissioners to set the policy, but I don't really think we have to be concerned about whether or not the Commission currently needs to reverse anything. Now the courts have already spoken out very clearly. We have a great deal of experience with the Executive Order 11246, and the line of cases supporting goals and timetables for government contractors.

It seems to me that you do have a great deal of power over this agency, a power sometimes which I hesitate to suggest, because there are times when it works against an agency, and that is the power of the dollar. That agency, in fact, comes to this Congress for its authorization for its budget. So you do have that power.

I would suggest to the committee that the Chairman of the EEOC and the acting general counsel be remind that they are government officials. They have taken an oath to uphold the law of the land and the law of the land currently, until that is changed by the Supreme Court, indicates that goals and timetables are appropriate relief in cases where the Courts have deemed so.

Mr. **Martinez**. Thank you, Mr. Brown. I'd like you, Professor Norton, to respond to that, but before you do, I'd like to indicate that the report that you offered will be entered into the record without objection.

Ms. **Norton**. Thank you very much.

[The attachment to Ms. Norton's statement follows:]

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JUSTICE DENIED: THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION UNDER THE REAGAN ADMINISTRATION

February 1986

"Justice Denied: The Equal Employment Opportunity Commission Under the Reagan Administration" is a publication of the Women Employed Institute. The Institute is the research and education division of Women Employed, a national organization of working women founded in 1973. The Women Employed Institute conducts research on issues of concern to working women, analyzes national equal opportunity policies, monitors equal opportunity agency performance. In addition, the Institute publishes economic analyses, recommended corporate policies, skills development materials, and technical analyses of legal issues.

Women Employed is a membership organization which promotes economic equity for women, advocates for increased opportunities in education, job training and employment, and provides career development and job hunting services to women. Women Employed has helped thousands of women find jobs, develop their careers, and successfully deal with sex discrimination problems. The organization has had a major impact on federal policies affecting enforcement of equal opportunity laws and on corporate equal opportunity programs.

This study was written by Shelley Gates, Nancy Kreiter, and Anne Ladky of the Women Employed Institute staff. Research for certain portions of this report was conducted by Nanci Thomsen.

For a complete publications list, write to the Women Employed Institute, 5 S. Wabash, Chicago Illinois 60603. Additional copies of this report are available for $5.00 each.

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INTRODUCTION

For over twelve years, Women Employed has actively worked to focus attention on the problems of employment discrimination and its impact on women's economic status. The organization has closely monitored both the performance and policies of federal equal employment opportunity enforcement agencies, including the Equal Employment Opportunity Commission (EEOC). Women Employed's advocacy programs include a Job Problems Counseling Service for women with discrimination complaints, monitoring agency performance in handling cases, and development of specific proposals for improving enforcement efforts.

The EEOC is the nation's lead agency responsible for enforcement of equal employment opportunity laws. The findings of this report show that the Reagan administration is damaging the effectiveness of the agency established to protect the rights of women and minorities to equal employment opportunity. The drastic reduction in enforcement activity combined with agency policy changes has eroded the Title VII rights of women and minorities and has reversed our slow progress toward the eradication of employment discrimination.

This report documents the EEOC's deteriorating enforcement performance and analyzes recent EEOC policy changes which we believe run counter to the agency's mandate to enforce equal employment opportunity laws. To compile this report, the Women Employed Institute analyzed the EEOC's performance data and policy directives issued by EEOC Chairman Clarence Thomas, and interviewed attorneys specializing in equal employment law and EEOC complainants.

The major findings include:

- The strong emphasis on fair settlements, rapid resolution of charges, and the commitment to strong enforcement that existed during the Carter administration has been replaced by inaction, incompetence, and hostility toward victims' rights to reasonable remedies.

- The number of complainants who received some type of settlement after filing a charge at the EEOC has declined drastically since Fiscal Year 1980.* In 1985, only 14.4 percent of all cases filed at the EEOC were settled. In 1980, 32.1 percent of all cases were settled. Furthermore, litigation activity has fallen by 22 percent. In 1985, only 286 cases were filed in court by the EEOC.

- More and more frequently, the EEOC's incompetence has forced complainants to hire attorneys to ensure that they are adequately represented and protected during the complaint process. Congress intended that the EEOC aid victims of discrimination in the resolution of their charges without requiring legal counsel. The current condition of the agency could effectively limit Title VII protection to those who can afford to pay for it.

- The Chicago District Office, which boasted the best performance record in the nation during the Carter Administration, now performs at levels

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*Throughout this report, all references to performance data by year signify Federal Fiscal Year (October 1 - September 30).

below the national average in certain performance areas and is experiencing serious management problems.

- The EEOC has created policies in the areas of litigation, remedial relief and pay equity which are weakening overall enforcement and reducing the agency's future effectiveness. The resources being expended on these ill-conceived policy changes could be better used to strengthen enforcement.

Because it has become increasingly difficult to obtain EEOC enforcement data under the Reagan administration, detailed studies of this kind may be impossible to conduct in the future. Since 1981, we have had to file Freedom of Information Act requests to receive EEOC District Office Reports which we received on a routine basis during the Carter administration. In November of 1985, we were informed by the EEOC's legal department that the District Office Summary Reports, one of the main sources of statistical data, had been discontinued. Access to the EEOC's performance statistics is vitally important if constituency groups are to successfully monitor the agency.

The EEOC: Its Mandate and Enforcement History

The Equal Employment Opportunity Commission was created by legislative order in 1964 as the agency responsible for administering and enforcing Title VII of the Civil Rights Act. Title VII prohibits employment discrimination on the basis of race, color, sex and national origin. Currently, the EEOC is the principal federal equal employment opportunity enforcement agency, with the following laws and regulations in its purview: Title VII, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, and various requirements concerning nondiscrimination by federal agencies. The agency is also responsible for the coordination of implementation of all equal employment opportunity legislation orders, and policies.

Over its twenty-year history, the EEOC has undergone two major restructuring efforts and is currently undergoing a third. The first effort grew out of frustration with the EEOC's inability to attack class-wide or systemic discrimination and the agency's lack of enforcement power. The original framers of Title VII had greatly underestimated the extent to which discrimination affected whole classes of employees, rather than isolated individuals. They had also underestimated the level of resistance they would encounter from recalcitrant employers. Thus, in 1972, Congress amended Title VII to empower the EEOC to file lawsuits to attack class-wide discrimination.

The agency was again restructured in 1977 to resolve major enforcement and management problems. Eleanor Holmes Norton, Chair of the EEOC during the Carter administration, took charge of an agency hampered by huge case backlogs, an average charge processing time lapse of two full years, and an ineffective systemic program. To get the agency moving again, Norton upgraded the charge intake process and introduced the Rapid Charge Processing System. This system was developed to overcome barriers to timely settlement of charges -- an outcome desirable to both charging parties and respondents. Under the previous system, a major barrier to the settlement of charges had been the EEOC's policy that a charging party should not settle for less than the full measure of her/his Title VII rights. The Rapid Charge Processing System heavily emphasized the negotiation of quick, no-fault settlements between the charging party and the respondent. In this process, the EEOC acted as a mediator or advisor. If a charge could not be resolved through the Rapid Charge system, the EEOC could send the charge to its extended processing unit for additional investigation and conciliation.

Recognizing that race and sex discrimination was, by definition, discrimination against a class of people and not only isolated individuals, the EEOC under Norton designated a separate unit in each district office to develop and investigate systemic charges. Systemic cases were developed through the EEOC's statistical analyses of employers' work forces. The agency initiated charges against companies that met certain targeting criteria, including low representation of women or minorites compared to their availability in the labor force; overrepresentation of minorities and women in lower paying jobs; use of employment policies and practices not justified by business necessity that adversely affected minorities and women. In other words, the agency attempted to seek out discriminatory employers, rather than simply reacting to charges by individual complainants.

To fill the gap in coverage between Rapid Charge processing of individual charges and systemic charges, the EEOC instituted the Early Litigation Identification (ELI) program in April of 1979. The ELI program was intended to expand individual charges that had a potential impact for a class of persons. For some charges, a remedy for the individual complainant would not provide remedies for other similarly situated individuals unless the EEOC expanded the charge and settlement to include them.

Aspects of the new systems and programs implemented under Eleanor Holmes Norton were criticized, but were generally well received by respondents and complainants. Most women's and civil rights organizations praised the Rapid Charge Processing System, but urged the EEOC to increase efforts in the systemic units. The agency's emphasis on speedy resolution of individual charges produced positive results. By 1980, the EEOC's settlement rate was over twice the rate for 1976 and the average time for processing a charge had dropped from 24 months in 1976 to between 3 and 6.5 months in 1980. In addition, the backlog of cases decreased from 130,000 in 1976 to 37,675 in 1980.

The agency's third and current reorganization began with the election of President Reagan in 1980. EEOC policy and enforcement initiatives under the Reagan administration differ markedly from those under the Carter administration and reflect the current administration's basic beliefs about how discrimination should be remedied. Reagan administration policy makers believe that relief to victims of discrimination should be limited to identifiable, proven victims only and not awarded on a classwide basis. Also, they believe that affirmative action should consist of outreach efforts only to increase the number of women and minority applicants -- not numerical goals and timetables that insure increased hiring and promotion of qualified women and minorities. These basic tenets are inherent in the recent changes in the EEOC's enforcement and remedial policies.

ENFORCEMENT

Women Employed has consistently monitored the EEOC through statistical analysis and our work with complainants for over twelve years. By compiling and analyzing the agency's own performance statistics, we documented the steady improvements that occurred at the EEOC during the tenure of Eleanor Holmes Norton, and we have documented the rapid deterioration of the agency during the Reagan administration. The following assessment of the EEOC's performance is based on the most recent statistics available (see Table I and Sources) and on information obtained through interviews of complainants and employment discrimination attorneys in the Chicago area.

Major Shift in Individual Charge Processing

The Rapid Charge Processing System established during Norton's tenure is, practically speaking, no longer in operation. As stated earlier, this system reduced the average length of time for processing a charge to three to six months, down from the previous average of two years. Complainants and employers were usually brought together in a face-to-face fact-finding conference, usually scheduled within one to two months after a charge was filed. These fact-finding conferences facilitated prompt settlements and avoided extended investigations which are burdensome to charging parties, employers, and the agency.

During the current administration, EEOC charge processing has shifted [illegible]amatically. At the point that Reagan appointees took over the agency, 32.1 percent of all new charges filed resulted in settlement. In fiscal year 1985, only 14.4 percent of all new charges filed resulted in some type of settlement. Currently, over 56.2 percent of all new charges filed are determined "no-cause" by the EEOC compared with 28.5 percent of the cases filed four years ago. A "no-cause" finding by the EEOC means that the agency has determined that a complainant has no reasonable cause for filing a discrimination charge against his/her employer. Our research indicates that charges are being determined "no-cause" indiscriminately because of a lack of training on the part of the intake and investigative staff, a lack of resources to complete adequate investigations, and management's emphasis on closing files rather than quality intake and investigation. The current "no-cause" rate of 56.2 percent means that of those who take the time, effort, and in many cases, risk to file charges against an employer they believe to be discriminatory, over half are turned away from the agency and must either bear the expense of an attorney and a lawsuit or drop their charges.

EEOC Litigation Activity Remains Low

The administration's lack of commitment to strong enforcement can also be seen in its litigation record. Although the agency's new litigation plan resulted in a large increase in the number of cases recommended to the General Counsel in the second half of fiscal year 1985 (see p. 16), the EEOC's overall litigation record during the Reagan administration is dismal. In 1985, 286 cases were filed in court by the EEOC, 22.3 percent fewer than in 1981 when 368 cases were filed. And even with the new litigation plan in place, only

277 cases were approved by the Commission in fiscal year 1985, a decrease of 23.9 percent compared to 1981 when 364 cases were approved. Recently, the EEOC launched a public relations campaign to tout its increased litigation activity, claiming that the Commission filed 411 cases in 1985. However, this claim is highly inflated. In fact, 125 of these so-called cases are subpoena enforcement actions, which are legal techniques used to obtain information, access to employer records, etc. It is misleading to compare the number of cases filed in 1985 including subpoena enforcement actions with numbers of cases filed in previous years that do not include such actions. We strongly favor EEOC litigation against discriminatory employers when conciliation efforts fail. However, given the EEOC's overall enforcement record, we question whether the agency can or should allocate the resources required to successfully achieve the new litigation plan's objectives.

Case Processing Time Lapse Lengthens; Case Backlog Grows

Even with a high level of "no-cause" determinations, it now takes the agency an average of between 6.4 and 6.9 months to process an individual charge, compared to between 3 and 6.5 months in the last full year of the Carter administration. The growing case-processing backlog is another indicator of the decline in the EEOC's performance. During Norton's tenure, the backlog of 130,000 cases which she inherited was reduced by 71 percent, or over 92,000 cases in 4 years. The pace of reduction of the backlog has not only slowed in the Reagan EEOC; it has actually been reversed. There were 33,417 backlogged cases in 1982; by 1985, there were 44,918 cases backlogged. Moreover, the EEOC itself currently estimates that it will have 65,474 unresolved charges in 1986 -- a 96 percent increase in four years. Overall, the EEOC reports that only 25,578 persons were assisted by the agency in 1984, compared to 64,581 the previous year and 51,886 in 1982.

Management Problems Plague Chicago District Office

The Chicago District Office of the EEOC provides one of the most glaring examples of the agency's deterioration. During the Carter administration, the Chicago office boasted the best performance record in the nation and was designated by Eleanor Holmes Norton as one of three model offices when Rapid Charge Processing was first implemented. The performance record for that office has fallen to levels which are, in some areas, below the current dismal national averages (see Table II). In the final reporting period under the Carter administration, nearly 47 percent of all charges in the Chicago District Office were settled. In 1985, only 11 percent of complainants in Chicago had their cases settled, a figure even lower than the 14.4 percent nationwide settlement rate. Similarly, 53 percent of all charges filed in Chicago in 1985 were determined "no-cause", compared to 34.6 percent during 1980. Finally, during the Chicago office's peak performance years, charges filed with that office were processed and closed in as little time as three weeks. The longest processing time was 8 months in cases which required extensive investigation. Charge processing in Chicago during the first half of fiscal year 1985 took between 7.3 and 8.4 months for all charges. Nationally, the longest processing time is just under 7 months.

In addition, we are receiving increasing numbers of complaints about incompetent District office staff from attorneys for complainants, as well as from complainants themselves. The following three case summaries are examples of typical problems that we uncovered through recent interviews with attorneys who handle discrimination cases and individuals who have filed charges with the EEOC in the Chicago area.

Case # 1: Failure to Investigate

A complainant filed a charge at the EEOC's Chicago District Office claiming that her employer had fired her for having an abortion and that her employer had publicly announced his reason for firing her. Four months went by before the employer responded to the EECC investigator's request for documentation of his side of the story. An additional seven weeks went by before the employer actually provided the documentation. During that time, the complainant heard nothing from the agency. When she spoke to the EEOC investigator several months after filing her charge, she was told that she did not have a good case. Shaken by the agency's response, the complainant contacted an attorney. As soon as it was legally permissible, the attorney requested a right to sue letter and a copy of her client's case file from the EEOC. The xeroxed file showed that no investigation of the charge was ever done beyond the collection of cursory information from the employer. The file contained three pages of documentation from the employer, with an attached cover letter. The documentation and cover letter contained obviously contradictory information concerning the case, a fact that was not noted by the investigator. The attorney concluded that the EEOC investigator had not read the documentation requested from the employer. The attorney for the complainant filed the case in federal court.

Case # 2: Lack of Staff Training

The complainant filed a race discrimination charge at the EEOC's Chicago office and hired an attorney. The attorney worked with the assigned EEOC investigator, providing copies of notes she had written up from interviews with her client and the one identified, located witness. When the investigation was underway, the case was transferred to the Milwaukee office because of understaffing in the Chicago office. The case was assigned to an investigator in Milwaukee. The complainant's attorney was contacted by this investigator only after the attorney made repeated inquiries about the status of the case. The identified witness from whom the attorney had received information about the case was contacted by the investigator only after repeated requests by the attorney and only after the attorney had spoken with the investigator's supervisor. This was more than a year after the charge was filed and the witness had, not suprisingly, forgotten much useful information. Although several persons employed by the company at the same time as the complainant could have served as witnesses in the case, the investigator did not attempt to identify or locate them. Continued pressure from the complainant's attorney finally resulted in one half-hearted attempt to locate an employee who had worked at the company for over ten years. The attempt failed. In response to the attorney's inquiries about the agency's responsibility to locate and contact identified witnesses, the investigator informed the attorney that it was the attorney's job to investigate the case. On the basis of this "investigation", the EEOC found no reasonable cause to believe an act of discrimination took place; the complainant is now appealing to the EEOC for a rehearing.

Case # 3: Incompetence by Intake Staff

In this case, an intake officer at the Chicago office took a complainant's charge and subsequently threw it away without her knowledge because the officer decided that the charge did not measure up to legal standards. This was a sex and age discrimination charge filed by a personnel executive against her company. The complainant's attorney became concerned when the complainant did not receive a copy of her charge within the normal period. When the attorney questioned the intake officer regarding the whereabouts of the charge, he informed her that he had not written it up because he did not think the complainant had a good case. Fortunately for the complainant, her attorney was able to obtain a "right to sue" letter from the agency in time to file the suit in federal court. Regardless of the intake officer's opinion of the merits of the complainant's charge, she had the right to have her charge written up by the EEOC. If the attorney had not followed up regarding the filing of the charge, the personnel executive would have risked losing her Title VII rights altogether as it is extremely difficult to file a discrimination charge in federal court without having first filed at the EEOC.

These problems are typical of those experienced by many persons filing charges at the EEOC. In interviews, complainants most commonly cited indifference or even hostility from agency staff. Many also cited instances of bias in favor of the employer's position before case investigation was initiated. Attorneys who were interviewed cited a lack of basic knowledge of Title VII case law by the EEOC intake and investigative staff. Many also mentioned that they believe the agency is understaffed at the intake and investigative levels.

The agency was originally created to provide a system for resolving discrimination complaints that would allow victims to obtain relief without court action. In each of these three cases, the complainant would not have been adequately represented and protected during the complaint process without an attorney. Since many EEOC complainants cannot afford to hire an attorney, a system that requires additional paid legal help to ensure a fair hearing effectively denies many persons their Title VII rights.

The information obtained through our interviews was corroborated and expanded upon in an internal EEOC Office of Program Operations Memorandum dated October 28, 1985. The memorandum detailed the findings of a Program Management and Quality Assurance Review of the Chicago Office which was completed in July of 1985 by national EEOC staff.

The memorandum emphasizes the Chicago District Office's serious shortcomings in case processing management, investigatory planning and performance, and in the determination of final EEOC actions on cases. Excerpts from the memorandum are highlighted below. Overall, Program Operations determined that:

> ...the District has slipped from its high performance in previous years. The case file and management review revealed numerous errors in procedure and quality that [require] urgent attention.

> ...the fact remains that...cases often appear improperly concluded or written up largely on the statements of respondents.

The review of the Chicago office's charge filing procedures indicated that investigative plans were not being prepared in accordance with EEOC guidelines:

> Investigative plans were not found in many of the files, and many did not contain specific enough information to be considered a plan. The documents examined tended to be cryptic reiterations of the...data requested [from employers], which did not focus on witness testimony, and contained no evidence of supervisory review.
>
> In most files the log of investigative activities [a standard EEOC form] was virtually useless as a tool for tracking the processing or general identification of cases...[A]ttempting to reconstruct the activity on any one case...was nearly impossible, as information contained therein was frequently absent or incorrect.

In the section on final actions taken on cases, a number of specific cases were reviewed in detail. In a case alleging individual and class-wide hiring discrimination based on national origin:

> An examination of the investigative memorandum and the file...indicated that the data needed to resolve the class issue was requested, but never obtained. Additionally, the file evidences no conscious intention or substantive justification for narrowing the scope of the investigation. This is particularly disturbing in light of the fact that 77 percent of respondent's...staff is white...which is consistent with the charging party's allegation. Charging party also provided the names of four other Hispanics who unsuccessfully sought employment with respondent. However, the file contained no evidence that a concerted effort was made to contact any of these individuals.

In a sex discrimination in hiring charge:

> ...the charging party alleged possible class violations which were not pursued. Half the witnesses named were not contacted; respondent claimed to have hired from submitted resumes yet the four men hired [instead of the charging

> party] did not submit resumes; lists of applicants whose resumes were on hand prior to the alleged violation date contained no women yet evidence indicated women had submitted resumes, in fact, the respondent coincidentally forwarded the originals of the women's resumes to the [EEOC]. No information was ever obtained on the respondent's hiring policy, despite the fact that hiring was an issue. Nevertheless, the charge was dismissed, presumably, on its merits.

The memorandum outlines numerous additional management and enforcement problems and orders the District Director to take immediate corrective action.

EEOC POLICY ISSUES

The EEOC has adopted new policies regarding agency litigation efforts, remedies for victims of discrimination and sex-based wage discrimination. EEOC Chairman Thomas has also expressed an interest in revising the "Uniform Guidelines on Employee Selection Procedures". An explanation of these policy changes and their impact on both the effectiveness of the EEOC and Title VII case law follows.

Litigation Policy

In September of 1984, the EEOC adopted a policy statement directing the agency to litigate each and every charge on which it issues a "reasonable cause" finding. To implement this policy as it is stated in the EEOC directive, agency attorneys must be involved during the investigative process at all stages in all cases; the regional attorney must assess the merits of each case and make a recommendation to the District Director as to whether the case is in fact litigation-worthy; the District Director must then consider recommendations of all staff involved in a case and issue a statement of "reasonable cause" or "no-cause" for each charge filed at the district office. Every case which is found by the District Director to be litigation-worthy and for which conciliation has failed is forwarded to the Regional Attorney who then forwards each case to the General Counsel for review and submission to the Commission. The EEOC's current litigation statistics show the early results of the new emphasis on litigation: during 1985, 708 cases were recommended to the General Counsel, compared to only 276 in 1984 and 393 in the last year of the Carter administration.

Unfortunately, while the new litigation policy has increased the number of cases going to the General Counsel, the plan has several flaws which make its long-term success doubtful. First, the emphasis on litigation shifts the EEOC's posture toward the adversarial and away from conciliation. While litigation must be a part of any law enforcement program, it must not be the only part. The Rapid Charge Processing System was instituted to encourage the prompt resolution of charges while respecting the rights of both charging party and respondent. The EEOC's shift in emphasis destroys the climate necessary for settlement and has the effect of providing remedies for fewer victims of discrimination, which is evidenced by the EEOC's 1985 settlement rate of only 14.4 percent. In the first half of 1985, only 2,964 victims of discrimination received monetary benefits through charges filed at the EEOC. By comparison, in 1980, 15,328 individuals received monetary benefits.

Second, local EEOC offices have been informed by the national office that it will not consider systemic charges for litigation unless specific individual victims, in addition to the charging party, are identified, located and interviewed. Even under the best of circumstances, it is often difficult to identify such victims through an EEOC investigation. And, as our interviews with victims and attorneys showed, the EEOC is often either unwilling or incapable of interviewing identified victims, let alone locating and interviewing additional ones. This means that many cases with the potential for remedying large numbers of victims will not be pursued by the EEOC.

Third, the Commission's assertion in the Directive on Enforcement Policy that "[o]ne finding of discrimination is no more 'worthy' of litigation than any other finding of discrimination" is cause for serious concern. The directive states that "the Commission believes that an enforcement philosophy or operational system which attempts to determine which among several meritorious findings is 'worthy' of governmental resources is inconsistent with our statutory obligations." Given the relatively limited resources of the agency, this position is indefensible. Agency management is responsible for allocating resources for greatest potential effectiveness. Although individual victims must have access to government litigation resources when needed, the EEOC must aim to reduce discrimination overall. In the past, systemic or class-wide litigation has been the agency's most important weapon in the fight against employment discrimination. The impact of such cases as a deterrent to continued discrimination by employers is ignored under the current litigation plan, and the agency's limited resources can be totally exhausted on individual cases which have no far-reaching impact.

Fourth, without a substantial increase in its legal staff, it is doubtful that the EEOC can handle such a large increase in caseload. While the number of cases recommended to the General Counsel jumped from 276 in 1984 to 708 in 1985, the number of cases actually filed in court increased from 226 to only 286 in the same time period.

Remedial Policy

In February of 1985, the EEOC announced its new "Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination". Responding to extensive criticism from women's and civil rights organizations concerning the agency's dismal enforcement record, the EEOC announced this new "get tough" policy. Under this policy, the EEOC will not settle discrimination charges unless the respondent meets requirements that we believe are unrealistic and counterproductive to conciliation.

First, the employer is required to notify all employees at the affected facility of their right to be free of the unlawful discrimination that occurred. Unlike the notice-posting remedy often used in National Labor Relations Board settlements, however, the EEOC's notice may include the names of individuals who filed the charge. This provision serves no good purpose and has a chilling effect on potential complainants, most of whom wish to avoid such notoriety. Women Employed's experience with counseling potential EEOC complainants has shown that it is difficult enough for them to file and pursue their charges without this provision. In the process of supposedly remedying a charge, the EEOC is in fact penalizing the victim.

Second, the policy provides that the respondent must unconditionally offer each identified victim of discrimination the position that person would have occupied if he/she had not been discriminated against, even if the job has been filled by another person. Obviously, this policy punishes employees who are not responsible for the discriminatory act or for management's actions. Even in the unlikely event that an employer would agree to such a provision, it would certainly cause discord and resentment among employees and, again, penalize the victim.

Third, the policy states that "full relief" must be obtained in every case in which a "reasonable cause" finding is made. That is, no settlement or compromise, even if acceptable to both parties, can be entered if it falls short of full Title VII relief. This requirement will certainly stand in the way of conciliation and settlement, and provides no flexibility to obtain some relief in cases in which full-scale litigation is neither necessary nor realistic.

Fourth, the effective and widely accepted remedy of goals and timetables for filling future vacancies has been completely omitted from the new remedial policy; in fact, EEOC regional attorneys have been instructed by the General Counsel that goals and timetables are not to be used as a remedy in settling EEOC suits. EEOC Chairman Thomas has stated that he is against this traditional remedy because it is "difficult to monitor". In fact, this change comes directly from the administration's deep opposition to active methods of reducing discrimination.

EEOC Policy Decision: Sex-Based Wage Discrimination

In June, 1985, Chairman Thomas announced the EEOC's long-awaited policy decision in the area of sex-based wage discrimination or pay equity. The case on which the Commission based its decision involved an allegation by charging parties that the employer paid its administrative staff (85 percent female) less than its maintenance staff (88 percent male) even though the duties performed by the female employees required more or equal skill, effort and responsibility than the duties performed by the male employees. They also alleged that the employer intentionally set wage increases for female-dominated jobs at lower levels than the prevailing rate of increase for such jobs in local municipal agencies, while awarding wage increases for male-dominated jobs equal to the level of the prevailing rate for those jobs in local municipal agencies.

The Commission decided against the charging parties, stating that an employer's reliance on labor market data in setting wages is a "non-sex-based decision" and therefore not proof of a violation of Title VII. The Commission's reasoning in this decision fails to deal with the respondent's pay-setting practices in light of the disparate impact theory encompassed by Title VII. Using the so-called "market" as a primary factor in setting salaries has a discriminatory impact on jobs held primarily by women. The market or "going rate" is the amount of money employers are willing to pay for jobs based partly on what other employers are paying, on their own historic practices, who holds the jobs, or old notions of what women should be paid. The market is simply a reflection of employer decisions and historic practices that assign lower salaries to jobs filled predominantly by women than comparable jobs filled predominantly by men.

Furthermore, in all the public relations attendant to the announcement of the Commission's decision in this case, Chairman Thomas made no mention whatsoever of an obvious element of the case -- that is, the extensive occupational segregation evident in the respondent's workforce. We disagree with the EEOC's finding that the employer's sex-segregated workforce does not provide evidence that the employer assigned employees to certain jobs on the basis of their sex.

We believe the EEOC's decision in this case was based on both faulty information and a faulty application of Title VII. Women Employed's investigation into the EEOC's handling of this case produced further evidence of mishandling of charges by the agency. The Commission claims that the charging parties were repeatedly asked to provide evidence concerning the employer's use of salary surveys of higher paying establishments in determining wage rates for maintenance staff and surveys of lower paying agencies in determining wage rates for administrative staff. The Commission claims that despite these repeated requests, the charging parties never provided the necessary information. However, the union representing the charging parties claims that neither the attorney representing the claimants nor any of the claimants themselves were ever contacted by the EEOC for that information.

Impending Revision of "Uniform Guidelines on Employee Selection Procedures"

The EEOC is currently reconsidering the agency's "Uniform Guidelines on Employee Selection Procedures". The guidelines are a long-accepted interpretation of Title VII and a commonly used method of detecting patterns of discrimination in employment against women and minorities. In essence, the guidelines state that employment decisions about hiring, promotion, transfer or dismissal cannot be based on tests or other requirements that have a negative impact on a disproportionate number of women or minorities unless an employer can show that the tests or other requirements are job-related.

Chairman Thomas has stated that he has "serious reservations" about the guidelines because they encourage too much reliance on statistical proof of employment discrimination. Thomas believes statistics are "terribly overused" by the EEOC and that there should be a greater use of other forms of evidence such as oral testimony from witnesses and/or victims of employment discrimination or a company's own statement of hiring policy that excludes women or minorities.

The Chairman's comments on the use of statistics and his reservations about the continued use of the Uniform Guidelines reflect a basic misunderstanding of Title VII caselaw and the necessity of statistical measurements in proving many discrimination cases. The EEOC and the courts do not, as the Chairman suggests, find employers guilty of discrimination based solely on the use of raw statistics that show a negative impact on women and/or minorities. Instead, an employer is always given the opportunity to defend such a statistical disparity by showing, for example, that the women and/or minority candidates were not as qualified as white, male candidates. It is difficult to understand how an individual applicant or employee could prove that a test or other selection technique disproportionately excludes women or minorities without the ability to compare the number of applicants to the number of selections. The Chairman's preferred type of evidence is, unfortunately, extremely difficult to obtain. Without the use of statistical proof, many victims of discrimination will be left with no method of proof at all.

CONCLUSION

This analysis of the Equal Employment Opportunity Commission indicates that the agency is failing to fulfill its responsibility to victims of employment discrimination. To be effective, the EEOC must have thorough and speedy charge processing for individuals that is designed to produce fair settlements, an active program to combat systemic discrimination, and leadership committed to real progress toward equal employment opportunity. To achieve these goals, corrective steps are needed. These must include, minimally:

1. Immediate improvements in management and training of intake and investigative staff.

2. A strengthened commitment by agency leaders to strong enforcement of Title VII and all employment discrimination laws. We need an EEOC leadership that accepts the intent and requirements of Title VII and the case law developed to interpret it.

3. Improved allocation of the EEOC's scarce resources. Rather than continuing to put resources into the development of new policies, the EEOC's leadership should return the emphasis to strong enforcement.

4. Restoration of communication with organizations representing protected classes. In addition, the agency must continue to provide the necessary information to allow for public accountability.

Women Employed, along with a broad coalition of women's and civil rights organizations, will continue to press for strong enforcement of equal employment laws and regulations. Laws prohibiting employment discrimination have been effective when vigorously enforced. The goal of equal opportunity in employment for all citizens has been strongly supported by every administration since the passage of Title VII. We will continue to oppose all Reagan administration changes in policy and performance that reverse that historic commitment.

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TABLE I

EEOC

ENFORCEMENT STATISTICS

	FY'76	FY'80	FY'81	FY'82	FY'83	FY'84	FY'85
Total Closures	N.A.	49,225	71,690	67,052	74,441	55,034	62,494
Settlement Rate	14.0%	32.1%	28.9%	29.4%	26.2%	20.8%	14.4%
No-Cause Rate	39.0%	28.5%	29.4%	35.0%	41.1%	46.7%	56.2%
Time Lapse (months)	24	3-6.5	5-8	5.4-9.4	4.3-7.2	5.9-6.8	6.4-6.9
Backlog	130,000	37,675	20,238	33,417	31,538	39,893	44,918

LITIGATION STATISTICS

	FY'80	FY'81	FY'82	FY'83	FY'84	FY'85
Cases Recommended to General Counsel	393	469	401	338	276	708
Cases Approved by Commission	322	364	112	192	216	277
Cases Filed in Court*	326	368	164	136	226	286

* Excluding subpoena enforcement actions

Source: Women Employed Institute from EEOC District Office Reports; EEOC Legal Services; EEOC Office of Program Operations Annual Report: Fiscal Year 1985

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TABLE II

EEOC

CHICAGO DISTRICT OFFICE

ENFORCEMENT STATISTICS

	FY'80	FY'81	FY'82	FY'83	FY'84	FY'85
Total Closures	2,339	2,947	2,726	3,200	2,386	2,879
Settlement Rate	46.8%	40.4%	31.0%	27.8%	20.4%	11.0%
No-Cause Rate	34.6%	35.0%	46.7%	48.3%	48.9%	53.0%
Time Lapse (months)	.8-8.2	2.4-7.1	2.7-5.3	3.9-8.2	6-8.1	7.3-8.4*

* First half of Fiscal Year 1985-latest available data
Source: Women Employed Institute from EEOC District Office Reports; EEOC Office of Program Operations

SOURCES

Equal Employment Opportunity Commission, Annual Report, Fiscal Years 1980-1983

Equal Employment Opportunity Commission, Office of Program Operations, Annual Report, Fiscal Years 1984-1985

Equal Employment Opportunity Commission, Office of Program Operations, District Office Summary Reports, Fiscal Years 1980-1985

Equal Employment Opportunity Commission Memorandum to Kate Blunt, Director, Chicago District Office, From Joseph S. Bennett, Director, Region II Programs, Office of Program Operations, October 29, 1985: "Program Management and Quality Assurance Reviews of the Chicago District Office"

Equal Employment Opportunity Commission Memorandum to All Regional Attorneys/ All District Directors, From David L. Slate, General Counsel, December 6, 1983: "National Litigation Plan"

Equal Employment Opportunity Commission, "Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination", February 5, 1985

Equal Employment Opportunity Commission, "Statement By Chairman Clarence Thomas on First EEOC Comparable Worth Decision", June 17, 1985

Ms. NORTON. On the question that you asked regarding what Congress should do if the EEOC refused to enforce goals and timetables, may I say that I think a very serious question is presented by the Commission's present posture.

The Commission has said that it seeks full relief for complaints. If the Commission is now foregoing the opportunity to write goals and timetables into its conciliation agreements, or indeed into Court matters in which it is involved, I believe that it is foregoing full relief for actual charging parties at this very moment.

Moreover, a very serious question is raised as to whether or not the Commission is enforcing existing conciliation agreements and consent decrees which mandated goals and timetables. If, in fact, these two things are not now happening, I believe that the Commission is in violation of law. I also think that a specific vote on an issue like goals and timetables is necessary in order for the Commission to be bound to enforce goals and timetables.

The Commission, for example, at least before the uniform guidelines, may not ever have voted to apply the Griggs decision regarding adverse impact. Yet, if in fact the Commission were to approve litigation and allow its general counsel not to apply Griggs, I think it would be in violation of law, pure and simple. Moreover, much Commission policy is reflected in what are called Commission precedent decisions. At least, that's what they were called when I was there. That is to say that the decisions of the Commission would act as precedence to the field and encompass the policy of the Commission. Those decisions are very widespread, and I'm sure that almost uniformly today, at least up until this administration, they required goals and timetables.

With so much explicit policy reflected in so many ways, requiring goals and timetables, it seems to me that the Commission is under a duty to consider the matter before taking the step of voting no longer to apply goals and timetables itself. Also, a very serious question is raised as to whether or not it could legally take that position given existing Court precedence.

Mr. MARTINEZ. I have just one more question. I've used more time than I should relying on my own rules of 5 minutes, but before I turn to the Honorable Chairman Gus Hawkins, I have to ask this question, because I think it's important for each of the former chairs to answer.

What do you feel the impact has been with this current debate on the questionable legality of the use of timetables and goals? It's been reported in the news, and the news is interested, and people are being affected by, I think, employers and employees are worrying that it's going to be finally resolved. Could you tell me if you have a reaction as to what kind of an impact is being felt?

Mr. BROWN. Yes, I can indicate to you that in most cases the major employers are just confused. They're seeing conflicting signals coming out. As I continue my representation of major clients, I indicate to them what I think the law is, and then they tell me what they've heard over the radio and in the newspapers.

I think it's unfortunate that this whole situation has been brought about, but I think that the overwhelming majority of employers in this country, now having lived under goals and timetables for so long, are willing to continue to live under goals and timetables, and for the most part I believe that they have accepted that as a part of corporate life.

From the time that we're children, we set goals for ourselves. If we don't do it, our parents do it. If our parents don't do it, then our teachers did it for us. There is nothing unique about setting goals, and there is nothing unique about having timetables to meet those goals. That's what this whole question of corporate responsibility, it seems to me, is all about, the setting of appropriate goals and times within which to try to achieve those goals. So this is nothing foreign to the American way of doing business. They're willing to accept responsibilities, but I can tell you it makes it much more difficult for us to talk to corporate executives, and particularly people at the midlevel executive levels of corporations in this country when you hear the kinds of sounds coming out of EEOC that you hear now.

I say that to you, Mr. Chairman, knowing that seated just behind you is one of my adversaries who regularly beats my head in on a number of class action law suits and take money out of my corporate clients' pockets, I say that to you in the sense that it's something which is needed. We, between ourselves, have worked out goals and timetables which we thought were appropriate.

Ms. Vladeck now is probably going to take advantage of that statement and remind me about that sometime later on.

Mr. MARTINEZ. Thank you. Professor Norton.

Ms. NORTON. I agree entirely with Chair Brown. A recent experience he and I had may symbolize something of a reversal of roles between the Commission and employers. I think the problem is with the Commission and not with employers today who I think have matured on the question of law enforcement in the equal employment area. Bill Brown and I were invited to speak to a group of executives of AT&T. You may all remember that when Chair Brown was at the Commission he brought a landmark case that in many ways set the pattern for equal employment cases, and had an extraordinarily powerful effect on law enforcement thereafter.

That case also used goals and timetables so effectively that by the time I came to the EEOC, and we had to review the outstanding consent decree to see if it should be ended because the goals and timetables had been met, the decree had been so well crafted and had done its job so well that with four agencies doing a review of AT&T, we had to go before the Court and say that the consent decree should be lifted, because something like 97 or 98 percent of the goals and timetables had been met.

Here was AT&T speaking to Bill Brown who beat them over the head, speaking of beating people over the head, and Eleanor Norton who followed him, about what they should be doing now that the company had gone through divestiture with respect to these issues, and honestly seeking to know what was required of them today. Both of us, I think, felt some unease for them. The losers, I think, in very large part are not only charging parties, but employers, who after some years now having grown up with title VII, understand that other regulatory schemes have to be followed, but they do not know whether or not what they hear from this committee is the law, whether what they hear from federal courts is the law, whether what they hear from the EEOC is the law or whether, indeed, there is any law any more.

The insertion of confusion on the question of what the law requires is in my judgment the most unfortunate legacy of this administration in equal employment opportunity.

Mr. MARTINEZ. Thank you, Professor Norton. Chairman Hawkins.

Chairman HAWKINS. Thank you. You've already asked some of the questions, so if you did take unusual time, Mr. Chairman, it's well deserved.

May I commend all three of the witnesses. We obviously feel a little ashamed this morning. You have insinuated that we were rather rough on you when you were in office. If so, may we say we apologize and regret the day that we were as tough because the characters we face now are so impossible that I wouldn't even compare them with the witnesses seated at the table. We certainly appreciate the service that you rendered, and we were just merely trying to help you out.

Be that as it may, I think sometimes we make a mistake in assuming that the current Commissioners and general counsel and the Chair of the EEOC intend to comply with the law, and we discuss the law in terms of their performance today.

I think it's pretty obvious that they don't even intend to comply with the law. That follows a pattern in which you name individuals to an agency in order to exterminate the agency. I think that's what we're faced with, and for us to engage in serious communication with them seems almost beyond reach.

Now assuming, however, that there's another way of obtaining performance and insuring results, other than goals and timetables which obviously the current Commission does not believe in. The testimony clearly indicates that a majority of them do not believe in it, they do not even feel that they've changed the policy, because they felt the policy at all times allowed them to make these changes without any formed vote of the Commission.

It's pretty obvious the general counsel believes that he's operating without any particular mandate one way or the other, but as he sees fit to operate. Do you believe that they are justified in the manner in which they now perform their duties by the results which they have obtained? I think you, Ms. Norton, did indicate they even falsify the results.

Let's assume there is another way of insuring results other than goals and timetables, and I haven't seen it yet, but do you believe that the results which they have obtained would justify the manner in which they are now operating?

Ms. NORTON. Chairman Hawkins, my concern is precisely that this abandonment of goals and timetables has occurred at the same time that we see abandonment of other substantive policies as well. For example, the Chairman of the Commission has said he desires to eliminate statistical evidence, as if that were possible give the Griggs decision of the United States Supreme Court, but has submitted uniform guidelines on employment selection in order to try to effectuate at that.

At the same time, he has indicated that he believes that only individual victims should be the beneficiaries of remedies from the

Commission. It is precisely the wholesale abandonment of what have been standard remedies that occasions great concern, and, very frankly, I think the Commission is inviting law suits against itself as a violator of its own law.

Chairman HAWKINS. Well, isn't it possibly true that their statements are actually aiding and abetting the opposition rather than helping out those that have complained, but leaving apart the fact that they don't seem to operate under any particular alternative, do you think the settlements that they have made in various cases, the money settlements that they have obtained, even in the individual cases that they have closed, will justify this abandonment of goals and timetables? Mr. Brown?

Mr. BROWN. My answer to that, Chairman Hawkins, is absolutely no. It seems to me that if indeed their rhetoric is to be believed, that is as Professor Norton has indicated, that they're going to get full relief for these individuals, even assuming that you're not concerned about class relief, not only should you put them back in the same position financially, but if we're ever going to eliminate discrimination we have to enforce the current laws. I believe, Chairman Hawkins, you know better than anyone here in this room, the difficulty that you have when laws are poorly enforced or not enforced at all.

I know that without strong enforcement powers, EEOC would not be the agency it was under Professor Norton or under myself. I know that without strong enforcement powers, the changes we have seen since the enactment of the 1964 Civil Rights Act would not have occurred. Voluntary compliance does not work, has never worked and will never work, and it seems to me that it's almost incredulous to me to have an agency which is set up specifically to protect and to extend equal employment opportunity across this country and have the very individuals who are charged with that responsibility, not enforcing the law, I find it difficult to believe and to understand, would be a better way of putting it, to understand why anyone would accept an appointment to an agency if they don't believe in the mission of the agency.

Chairman HAWKINS. Well, you don't know these present characters. The same thing is happening in other agencies. They're not the only ones. We're having the same trouble in the Department of Education and in other agencies where individuals who don't really believe in the law are the ones who are named. We have a current situation of a nominee now being named as general counsel to the agency who obviously does not believe in the law, who has disqualified himself as observing the law, and yet he is a nominee named by the President to an agency.

So it seems to me that we are agreeing with each other, but how do we get beyond this? How do we, let us say how does this committee perform its oversight under a condition in which you have individuals who openly come before the committee to disagree with the law itself, and who do not, in effect, operate openly and honestly in reaching any decisions, and cannot even answer whether or not as a group, that has ever taken any action which instructs the general counsel to perform anything at all in terms of enforcing what we clearly understand the law to be.

If they are in violation of the law, and I think that is all we can conclude, then where does that leave us at this time in trying to get an agency to obey the law?

Mr. **Brown**. Mr. Chairman, I think it's a very difficult question. I believe that Professor Norton may have suggested the answer. The answer may not lie with this committee. It may lie with individuals and organizations across the country who are deeply committed to equal employment opportunity to bring actions against the agency and the individual commissioners to do what the law requires that they do.

I have not fully explored that legal question, but that certainly is a possibility, and something that perhaps should be considered.

Chairman **Hawkins**. I think we ought to go beyond what we're involved in now, because it's an open discussion. When Ms. Norton was chair of the Commission, we'd argue, we'd ask her to come to the committee, we would agree on certain things we felt should be done. To her credit, we reached that type of agreement. Sometimes we were wrong, sometimes we thought that she was wrong, to do it in a different way, but we always reached some agreement, but now, you don't have individuals that you can ask to come before the committee and agree what is the law, what is it that we are trying to do and come to any understanding.

You have one party that just doesn't want to cooperate in any way. It just seems to me that we should explore some other method of ignoring them and enforcing or at least bringing action to have the law itself enforced. I'm at the end of the rope. I just think you can't deal with individuals who don't deal fairly and honestly and above board.

Mr. **Brown**. I certainly share your frustration, and the thing that is even more disturbing is because of the lack of direction from Washington, many of the area offices and district offices around the country really are at a loss to understand what they should be doing, and whether or not the law is being enforced at the local level depends very often on the integrity of the individual who heads that office, or sometimes it depends on the integrity of the individual investigators. Then when they do go out and, in fact, apply the law as the law should be applied, many of them are castigated and called in on the carpet for having done so.

It is a very disturbing situation, and I agree with your sense of frustration, and I feel the same sense of frustration. I'm not sure what can be done with people who are not willing to accept responsibility or are not willing to enforce the laws as the laws have been written, except perhaps that we have to bring them into court, and have them answer for their actions.

Perhaps one additional thing, many of the civil rights organizations will have to begin to speak out much more forecefully about the total lack of commitment and sincerity that we presently see existing at the Commission.

Chairman **Hawkins**. I certainly want to say that the chair of this committee, this subcommittee, I think, is doing an excellent job, and I am certainly as chair of the full committee going to continue to assist in every way. We're not going to let up on them, so the message, I think, had better go out that this committee is really going to stay after them. I have a feeling that the chair of this committee is determined to do that, and we want to make it real rough on them in all of their operations and do whatever is necessary to see that they come back into compliance with the law. Thank you, Mr. Chair.

Mr. MARTINEZ. Thank you, Mr. Chairman. The chair would like to announce that we have just been joined by Steve Gunderson, the ranking minority member of the committee. Do you have any comments, questions?

Mr. GUNDERSON. Yes, I do, Mr. Chairman. I appreciate that. I want to assure the distinguished chairman of the full committee and you as well that one of the statements I have made very, very often is that equal opportunities and equal rights ought not be and is not partisan issues.

In previous hearings when we looked at the whole issue of goals and timetables, many Republicans would look with the same concern and skepticism to elimination of such devices that I think some of my Democratic colleagues would. The burden of proof would be on the Commission to show us that, quote, they can make the necessary protections of equal opportunity for all people in this country without goals and timetables if they so make that decision. Now, it's pretty clear that at this point in time, it's mainly the problem of the general counsel's office rather than, quote, a definite vote by the Commission, but nevertheless, the effect of these actions may be the same with or without a formal vote.

First, I wanted to make those comments so that you understand that the commitment exists on, I think, both sides of the aisle on this committee, and I think for the most part in Congress. But, second, I would be interested as to what you could suggest based on the experience you each have has as to how we can or cannot monitor progress in this area without goals and timetables if that be the case, or is that impossible to do?

Are there any other tools which we can use to keep track of, quote, progress and commitment throughout the country?

Mr. BROWN. Mr. Gunderson, I know of no way that this committee or any other committee can keep track of progress without the establishment of goals and timetables. It just cannot be done, and it's just that simple. If we are to indeed find out where people were, and where they're going and be able to measure the amount of progress, it's going to take goals and timetables to do that. I know of no substitute for that.

The business community has accepted that as a fact, and they're willing to establish goals and timetables. They have set goals for themselves in every other aspect of their operation, and this is nothing unique for them. To require goals and timetables in the area of equal employment opportunity is something that they have come to accept and to live with for quite a number of years.

I, too, am a Republican, served as chairman under a Republican President, and I can tell you that as far as the enforcement of the law was concerned and on the goals and timetables issued, there was no division between Democrats and Republicans, and I share your concern, and I applaud you for it. But, I see no way we can do our jobs, either I as an individual taxpayer or you as a Member of this Congress, in looking at the corporations around this country unless we do, in fact, require some objective way of measuring progress and goals and timetables is the way to do it.

Ms. NORTON. I appreciate very much the bipartisan way in which this committee now operates and operated when I was the chair of the Commission. I do think it important to continue to press goals and timetables even given the frustration that the committee has experienced thus far.

I agree with Chair Brown that the appropriation process may present an opportunity to extract promises from the agency to abide by existing precedents, until the courts indicate that goals and timetables are not a part of formal relief. I think this committee might consider some participation and input into that process.

I think the presence of the chair of the full committee here today and apparently earlier in the week serves to indicate that this is a matter of important priority for the committee and will send a signal of that kind to the EEOC.

I note that the debate that is going on about goals and timetables at the Office of Federal Contract Compliance Programs has, so far as I'm led to understand it, led some Members of Congress to indicate that they will join in legislation to make goals and timetables mandatory in Executive Order 11246 if they are extracted from it administratively.

If, in fact, that has happened by resolution, it may be that there is a majority in the House for such a resolution with respect to congressional desire for goals and timetables to continue at EEOC unless the courts indicate that they may no longer be used and that they are considered a part of full relief by the Congress.

All of this, I think, brings pressure on the agency, tends to isolate them in a view that after all is an isolated one in light of the law as it stands today.

Mr. GUNDERSON. Mr. Clark, any comment?

Mr. CLARK. I don't have any further comments. I think they've said everything I would have said.

Mr. GUNDERSON. Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Gunderson. Mr. Hayes.

Mr. HAYES. Thank you, Mr. Chairman. Obviously we have benefitted by some excellent testimony of all three witnesses. One of my weaknesses is to try to educe and define an issue in its most simplest term, and you can correct me if I'm wrong in my assessment of what you've said, each of you. Mr. Clark, you have said that minorities are looking for jobs, not litigation, and I completely agree with that assessment.

We do have a problem with increasing discrimination, because of race, sex and this whole area of efforts of people who are unemployed to find jobs.

I've always believed, and I think this is applicable in this whole area of employment opportunities, it is clear that law enforcement in this area has broken down. I've always believed if something is broke, you either repair it or replace it.

Ms. Norton, you said, and I want to make sure I quote you correctly, you charged that the Commission, and I'm putting it in my terms now, was foot dragging and to some extent, there was some dishonestly in the enforcement of the law. It's not likely, you said, that this can be corrected under this administration, so that means you can't repair it under this administration based on your assessment of our current position.

Where do we go which is, in fact, a continuation of the question raised by my chairman here? Where do we go? There is more than just frustration. I think people are going to rebel against the kind of what I called design discrimination. It's not by accident.

I think you've got a shortage of jobs and people are actually competing for the existence of the jobs even after being retrained to do certain jobs. They can't get placed on jobs. Race is being used, sex discrimination as bars to get in those jobs. Now we had the Commission as an avenue to try to correct these abuses. Yet, you've got a Commission who does not enforce the law.

Where do we go with this? We can't get rid of the Commission. You know, I'm giving you the conception of the average person in the community, particularly black people. Here you've got a black man heading the Commission, and he's said we don't need goals and timetables. What do we do with him?

If it's not for the record, I'll talk to you in private, but this is the situation that we face. I'm trying to make it plain. You've got an administration just sitting there. These kind of people who are saddled with responsible enforcement are saying look, go ahead, you're right, we support you. That's in effect what they say. If you can give us some kind of suggestion as to how we move off of this kind of situation when we've got this kind of dilemma, it would be helpful to me.

Ms. NORTON. Well, Congressman Hayes, other than the kinds of examples that we have indicated, use of the appropriations process, perhaps a resolution of Congress, I might indicate that I believe that the oversight of this committee has, indeed, been effective. I know it may be hard to see that, but I believe that when this committee has held hearings and called the EEOC to account, it has done better than when this committee did not hold hearings and called it to account.

As I indicated in my testimony, the EEOC was not nearly as derelict in enforcing the law in the first administration as it has been in the second term of this administration, and I'm not sure what accounts for that. There is great speculation as to what accounts for it, but I believe that to the extent that the Commission is called to come forward and explain itself, it has got to go back and consider if there's a way to do business it doesn't keep it in the process of being called to come forward and account for itself. Thus, I believe that the kind of oversight that you are now doing as slow as the results may seem to you, has indeed had an effect upon this administration and will continue to have some effect upon them, and certainly is very much better than letting them go without being called to account in this way.

Mr. HAYES. Do you think use of the appropriation process by reducing the funds for this do-nothing commission might be helpful?

Ms. NORTON. I think it is leverage. When you get to the point where the agency that enforces the law is abandonning the ways in which the law has always been enforced before, I think that the appropriations process presents the leverage that should be used. I certainly am not suggesting that the committee decides to reduce the funds of an agency that has already had its funds reduced. But, I do believe you would focus the agency's attention very strong, if you indicated that you were prepared to use the appropriations process for this kind of lawless activity.

Mr. **HAYES**. I realize my time is running out. I've got a couple of questions I want to ask you, Counsel Clark. Does title VII give remedies only to directly identifable victims of discrimination?

Mr. **CLARK**. I think that the current administration is wrong in trying to impose that kind of limitation on title VII. In questions of scarce resources like seniority which the Supreme Court has recently spoken to, the law was somewhat unclear as to what one could do in effecting the current seniority status of currently employed, incumbent employees. However, goals and timetables operate mostly prospectively in drawing who will enter the work force and who will enter an employer's employment.

You're not talking there about persons who have hardened expectations of employment, but simply what is the mechanism by which the employer is now going to integrate his work force. Now on that issue, I think that title VII authorized affirmative action. I think it is effective, and as Chairman Brown says, may indeed be the only effective means for clearly integrated work forces in the future.

So that I think it's both lawful and sound policy, and I think the administration is incorrect.

Mr. **HAYES**. Could you just briefly describe the difference between prospective relief under the Civil Rights Act of 1964 and make-whole relief?

Mr. **CLARK**. Yes, if you have a person who has clearly been the victim of discrimination, that person has applied for a job, they were turned down 6 months ago, it was discovered after investigation that they were turned down because they were a woman.

The way you make that person whole is you try to recapture what the events would have been had they been properly hired at the point when they applied, so therefore, that person is entitled to that pay, that person is entitled to retroactive seniority and in effect, they are put into the work force in the place they would have been had the employee operated lawfully.

Now when you talk about prospective relief, what you're talking about is here's an employee who has been discriminated against. We can find perhaps only at this current point in time 10 percent of the people who were turned down. Others have gone elsewhere. They may be employed to their satisfaction in other places, but that work force is 25 percent below what it would have been had the employer operated properly. What affirmative action simply says is to the employer, you will have a work force prospectively that reflects the percentage of persons who would have been hired had you not been discriminating, no back pay, no retroactive seniority for those persons who were hired, prospectively, but your work force will be like the work force of an employer who operated lawfully all along.

Mr. **HAYES**. Thank you.

Mr. **MARTINEZ**. Thank you, Mr. Hayes. This probably worked out just about right with the first panel although I did let the panel go longer than I had originally planned in scheduling the hearing, but I think it's evident to everyone that the sentiment of the testimony that you made was something that had to be heard, and it's certainly going to be beneficial to us, so we thank you very much for appearing before us today.

With that, we'll take a 10 minute break to vote and we shall return. Thank you all.

[Recess.]

Mr. **Martinez**. I'd like to call the next witness. We're reconvened. Peter Robertson.

Mr. Robertson, I've read your testimony, and it's quite extensive, and I would ask you to summarize your testimony, and your written testimony will be submitted for the record in its entirety. It is very, very good. I've read it, and I really enjoyed it. I think it's almost a manual or a journal by which the EEOC Commission ought to be operating which I don't think they are. Would you proceed?

STATEMENT OF PETER ROBERTSON, FORMER DIRECTOR, OFFICE OF POLICY IMPLEMENTATION

Mr. **Robertson**. Thank you, Mr. Chairman. Mr. Chairman and members of the committee, I will try to be brief. I must say I enjoyed the previous panel immensely. Having worked for both Chairman Brown and Chair Norton when they were preparing for hearings before this subcommittee, I would say they were more jovial about them today than they were sometimes when we were at the staff level of preparing.

But, that's my indirect way of saying that I think the vigorous oversight which you exercise, Mr. Chairman, continues to serve a good purpose. As you indicated, my testimony was quite lengthy, and I tried to cover a number of things, and what I would like to focus on in this summary is just one single point, and that is what I describe as the deregulatory aspect of numerical remedies. The terms, goals and timetables, the term, quotas, and other terms are used to describe the kinds of issues that are before the Committee. I choose to use the word numerical remedies, and it seems to me that in considering them, one major point has been missed, and that's the point that I'd like to call the deregulatory approach to remedies and discrimination.

I think an approach which uses numerical remedies and goals and timetables is both good law and good policy, but much more important in the context of this administration, it is, as I say, a deregulatory approach, and in suggesting that, there are three things I need to bring to the attention of the Committee.

First is that what we are talking about is remedying discrimination, and the starting point for my remarks might well be a quotation which I've included in full in my prepared testimony from EEOC Chairman Clarence Thomas at a speech he made here in Washington a conference in which he said, let's face it, and I'm paraphrasing, the quote is in the testimony, let's face it, we wouldn't be talking about affirmative action, we wouldn't be talking about remedies if there had not been a history of discrimination.

In terms of looking at that history of discrimination, it seems to me that several things need to be identified, and one is just exactly how have the courts defined discrimination. Now that may sound a little bit elementary, but in terms of the deregulatory approach to the remedies, I think it's important to revisit the definition.

Having worked for a couple of years for a United States Congressman, your honored former colleague, Henry Royce of Wisconsin, I have an obnoxious concern in looking at a statute to try and figure out what it was when Congress intended when they put the law on the books in the first place.

I can remember time after time when some agency or bureaucrat was abusing one of our constituents. The Congressman would send me to the telephone with the question, have them find the place in the statute where it requires them to do that, and send it to me underlined in red. So I go back to the law and to the legislative history whenever I can.

I have brought with me the legislative history of the 1972 amendments to title VII. I ask consent, Mr. Chairman, to include as an appendix to my testimony several pages from that legislative history in which the full committee of this subcommittee in recommending enforcement powers for EEOC back in 1971 and 1972 directed its attention to the definition of discrimination.

With your permission, I'll just quote a couple of lines. The committee report spoke about the fact that during the original debates on title VII, "Employment discrimination tended to be viewed as a series of isolated and distinguishable events due for the most part to ill will on the part of some identifiable individual or organization," what we came to call intentional discrimination.

Your committee report continued that experts in the field have come to recognize that employment discrimination was, as the report said, quote, "a far more complex and pervasive phenomenon and that experts focused on their systems and their effects."

The committee then went on to observe that one of the major reasons for the failure of the voluntary conciliation mechanism in the original title VII was that the average employer, at least in the early 1970's, lacked what you described as the technical perception to recognize systemic discrimination.

This mean that when EEOC sat down at the negotiating table, and asked an employer to include in their remedies changes in their employment systems, the employer would say they didn't have to do it because the law didn't require it. What you did, as I read that report, was in giving EEOC the power to file its own law suits, you were mandating EEOC that among the major things that they should use that power to achieve were changes in employment systems that operated in a discriminatory fashion, that is they excluded minorities and women and could not be justified by business necessity.

I accept that fundamental definition of discrimination as approved by this committee in that report, as approved by the equivalent Senate committee in a parallel report in almost identical language, your report having been written first. I note with interest that the Senate committee found it persuasive and adopted your language, Chairman Hawkins, almost verbatim.

The Supreme Court of the United States, more importantly than what I believe obviously, ratified that definition in the Griggs case which former Chair Norton mentioned in her testimony.

Now, in terms of the deregulatory approach which I mentioned, I was going to bring a couple of charts, but I wasn't able to get them printed up, and it's just as well, but I put in my testimony at page 9 what I would have sketched out on a chart for the purpose of using it to make the point on what I call the deregulatory approach to remedying discrimination.

If there are two elements in the systemic discrimination concept, a practice with an adverse impact and the fact that it cannot be justified by business necessity, then when you approach a remedy, you can attack either one or both of those two points. I spent a lot of time in my early years at EEOC attempting to frame remedies that imposed sweeping changes on employer systems, focusing on part I of that definition.

What I see happening when you move to numerical remedies is that you are providing an employer with an opportunity to focus on—I'm sorry, I've reversed it. I spent my time focusing on the second part, changing the systems, and if you shift to numerical remedies, what you are doing is you are shifting your focus to the first part and coming up with remedies that eliminate the adverse impact in the employer's practices.

Now there have been two major kinds of things occurring under the concept of numerical remedy. Some of them involve only monitoring, and some of them actually involve the decisionmaking process. Let me say what I think numerical remedies have involved and more importantly what they have not involved.

To me, a numerical remedy is something that a court imposes to remedy discrimination which requires an employer in some fashion to take the numbers of individuals that he is hiring, promoting or what have you into consideration as a function of race. It goes all the way, as I said, from monitoring to see how many individuals you have hired or promoted to what you have as a function of race, sex, or national origin. However, it has also included situations in which courts have ordered employers that from among qualified individuals they will hire or promote on a racial basis in order to eliminate their previous discrimination, and I would stress and underline in my written testimony that that has always occurred from among qualified individuals.

The sense that numerical remedies have involved hiring the unqualified is simply not supported by the case law. Every Circuit Court of Appeals that has looked at it, has ratified that approach. The U.S. Supreme Court has ratified it. In fact, the Chief Justice in twin cases involving schools in North Carolina said in the first case that remedies could not be always colorblind where there was a history of discrimination. More importantly, in the second case where there was a State law that presumed to outlaw race conscious remedies, the Chief Justice participated in writing an opinion that held that State law unconstitutional.

Here is a situation in which remedies come down that race-conscious, a State tries to block them, and the Chief Justice is so supportive of the concept that he throws out the State law trying to block that kind of remedy.

In sum, Mr. Chairman, two ways to approach eliminating systemic discrimination, you can either get involved in all of the details of how an employer does business, and reframe the systems that have had an adverse impact and substitute for them new systems that meet equally the employer's needs while eliminating the adverse impact, or you can frame a remedy for the employer that says to the employer, you are responsible for changing those systems. You know more about your own systms and how they work. What we're going to do is measure whether you have successfully eliminated the adverse impact, and the way that we will do that is to impose some kind of numerical remedy.

I would like to close by quoting some language from the Supreme Court opinion in the *Weber* case. Now while the *Weber* case dealt with a voluntary affirmative action plan that had race conscious elements, and these quotes are in their complete nature on page 25 of my testimony, in all four of them the Supreme Court emphasizes that to permit an employer the flexibility to figure out how to change his own systems as a way of eliminating adverse impact, meet a certain series of phrases from the congressional history all of which focused, as I say, on this deregulatory approach. Without quoting them in full, I'll just note the phrases. The Supreme Court noted congressional concern for "management prerogatives and union freedom," close quotes, and they found that a numerical approach would leave that undisturbed to the greatest extent possible.

Elsewhere, they spoke of allowing traditional business freedom or traditional management prerogatives, and avoiding "undue Federal regulation of private business." So, Mr. Chairman, there are lots of other things I tried to deal with in my testimony. I'll be glad to try and answer questions about any of them, but it seems to me if I can make just one point, it would be that a numerical approach to remedying discrimination is, in fact, a deregulatory approach, and one that should commend itself to this administration, one of whose major themes has been a deregulatory approach in dealing with how Government regulates the private sector. Thank you, Mr. Chairman.

[The prepared statement of Peter C. Robertson follows:]

PREPARED STATEMENT OF WILLIAM L. ROBINSON, DIRECTOR, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Mr. Chairman, members of the Subcommittee, I want to thank you very much for the opportunity to appear here this morning to discuss with you one of the most difficult issues confronting our nation -- that of appropriate remedies for employment discrimination under Title VII of the Civil Rights Act of 1964, as amended.

Before addressing that issue, I will offer a brief comment on my background so that you may understand the context in which my views have been framed. My governmental career began with service as administrative/legislative assistant to your former colleague, Congressman Henry S. Reuss of Wisconsin. While I learned much from Congressman Reuss, I think the most relevant lesson to our discussions here today was his belief that, in attempting to responsibly implement a statute passed by the Congress, one must go back to fundamentals and identify the nature of the problem Congress wished to solve and how it wished the law to be used in achieving that solution. I will attempt to do that.

After leaving the Congressman's office,I began what is now almost 23 years of service in the struggle to eliminate employment discrimination -- initially as "an enforcer" and then as a consultant. I was Executive Director of the Missouri Commission on Human Rights, and then worked for the Equal Employment Opportunity Commission. I now consult with Organization Resources Counselors, Inc. (ORC) and on a freelance basis.

As Director of the Missouri Commission on Human Rights I was responsible for drafting and attempting to persuade the legislature to pass (which they ultimately did) legislation which would assure that the Missouri statute met Federal standards and that Missouri was appropriate for the deferral of employment discrimination cases under Title VII.

At the EEOC during my twelve years of service, I had the honor of working for the three distinguished former chairs whose testimony has immediately preceded mine (Clifford Alexander, William Brown, III, and Eleanor Holmes Norton). I was Director of four different EEOC offices:

- The Office of Program Planning and Review,
- The Office of Federal Liaison,
- The Office of State and Community Affairs; and
- The Office of Policy Implementation.

In the State and Community Affairs and Federal Liaison positions I was responsible for attempting to achieve uniformity in the interpretation and enforcement of anti-discrimination laws as to both definition of discrimination and scope of remedy; first, between EEOC and the various state agencies and subsequently between EEOC and other Federal agencies.

As Director of the Office of Policy Implementation, I was responsible for managing the process by which staff brought policy recommendations to the consideration of the Commission in the form of regulations, guidelines, and probable cause decisions on precedent-setting issues as well as the process by which that policy got implemented. The office for which I was responsible managed the process of writing the Commission's Compliance Manual.

Since leaving the Commission in May of 1979, I have worked as a consultant on employment discrimination, affirmative action and related matters on a part-time basis with the management consulting firm of Organization Resources Counselors, Inc. (ORC) and as a freelance consultant on my own. With ORC I have been responsible for chairing the east coast meetings of its Equal Opportunity Group (EOG), a round-table process whereby more than 200 of the nation's largest corporations meet three times a year in a small group, round-table format (seven such meetings each time) to discuss legal developments in equal employment opportunity, affirmative action and related human resources issues, as well as responsible management approaches to dealing with these issues As a freelance consultant I have worked with government and industry in the United States and Canada. I have provided advice to several Federal government agencies in Canada and to many provincial agencies including British Columbia, Quebec and Ontario. For example, I assisted the province of Quebec in framing its Affirmative Action Guidelines. I should stress that the views expressed here while influenced by my clients are my own.

Throughout those 23 years I suspect that there has not been a single day in which I have not, at least once, done some thinking about the appropriate way to achieve compliance with the goals of anti-discrimination legislation -- that is, asked myself what are the appropriate remedies for discrimination whether imposed or adopted voluntarily by the business community. If I were to state to you now that, after that 23 years of thought, I can come before this Committee as an expert and tell you what the answer is, Mr. Chairman, you should immediately gavel me into silence as the greatest charlatan ever to be honored as a witness in this room.

I sat in this room on Tuesday and listened to the five incumbent commissioners of the Equal Employment Opportunity Commission as each of them in his or her own way struggled with this difficult problem and attempted to share with this Committee, as I will, his or her best thinking based upon analysis of the statute, applicable court decisions, and his or her responsibilities. Just as several of them noted that there was no specific aspect of this issue on which there is complete agreement among them so would I observe to this Committee that none of the five opinions presented concurred precisely with my own. At the same time, in reading through their prepared statements, and listening to both their testimony and their responses to your questions, I found in each commissioner's thoughts one or more elements that reflect aspects of my own thinking as it has evolved over the 23 years I have been struggling the general question of appropriate remedies under anti-discrimination laws and the specific question of whether those remedies must be color-blind, sex-blind, and nation origin-blind or whether in appropriate and limited circumstances they may include aspects that take race, color, and national origin into consideration.

I will give you the punch line first. I believe that both law and policy support the limited use in appropriate situations of what I call "numerical remedies." Before spelling out why I believe such a position is supported by both law and policy, I must tell the committee that this is a position that I did not come to quickly, lightly, or easily. Many of those who know me today and hear me speak in support of such a position might think that I invented it. Nothing could be further from the truth. As I said, I started out as Executive Director of the Missouri Commission on Human Rights. In 1963, we enforced the anti-discrimination law in a color-blind, sex-neutral fashion. I reacted with opposition when an early director of Research at EEOC attempted to persuade Missouri to adopt EEOC's EEO-1 reporting systems, under which employers recorded employees by race, sex, and national origin, complaining that we had just forced them to get rid of such records. It took several months to persuade me that such a reporting system was essential in order to identify and eliminate discrimination and to allocate limited resources in the fight against discrimination.

When the concept of defining discrimination that measured numbers as part of the analysis rather than focusing on an employer's intent was introduced it also took time to persuade me as it did when goals and timetables and other sex-conscious, race-conscious numerical measures were first proposed to me by way of remedy. But enough about about me, what about the law?

In beginning my analysis of how we got to where we are today and why I believe numerical remedies are appropriate, from both a point of view of law and that of policy, I start by examining the statute, Title VII of the Civil Rights Act of 1964, that we are discussing.

What did Congress wish to achieve when it passed that statute?

My approach to this is taken, if you will, from one of the five commissioners who testified here on Tuesday. In a speech before the National Conference on Equal Employment Opportunity in the Federal Sector, on October 1, 1982, EEOC Chairman Clarence Thomas talked of the importance of eliminating some of the emotion from discussions of affirmative action and remedy and urged us to remember:

> "that affirmative action was not created in a vacuum and that it was not created in a color-blind society. It must be remembered that affirmative action has been put in place because minorities

> and women have been discriminated against in the past." (Emphasis in the original.)

Thus, I begin of my analysis, as suggested by Chairman Thomas, by taking a quick look at the concept of employment discrimination. If you are going to look at remedies you need a clear view of what you are going to remedy.

In taking this look, I feel a bit like the football coach whose team had been battered 45-0 in the first half and who began his half-time locker room exortation by telling the team he was going to start with some "basics" and then took his hand from behind his back and extended an object toward the team with the observation that "in the first place, gentlemen, this is a football."

What then is this "football" that we call discrimination and how will going back to basics and understanding discrimination help us focus on appropriate remedies?

As this Subcommittee's full committee pointed out in its report recommending enforcement powers for EEOC in 1971, the concept of discrimination has undergone a considerable evolution since Title VII was first passed.[1] That report, which Congressman Hawkins sent to the full House on June 2, 1971, pointed out that discrimination was originally perceived as involving only those things that an employer did intentionally to exclude individuals because of their race, sex, national origin, or other prohibited grounds. The report pointed out that employment discrimination had come to be viewed "as a far more complex and pervasive phonomenon" and that experts generally described "the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs." What that report reflected was what has now come to be called the Griggs or systemic definition of employment discrimination, which in summary holds that a practice or system with an adverse impact is illegal unless justified by business necessity -- See Chart I.

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[1] House of Representatives Report 92-38 at page 8-9, reprinted in "Legislative History of the Equal Employment Opportunity Act of 1972" at pages 68-69. Parallel language was in a Senate Report, Ibid, p. 414.

The Committee report continued with the observation that the average employer, still believing that discrimination consisted of only intentional action, lacked the "technical perception" to recognize that a system could be unlawful. Employers often refused, in the context of Title VII's original voluntary compliance mechanism, to make changes in their systems when requested to do so by EEOC in the context of a case (in which probable cause had been found) when EEOC was attempting to seek a remedy through negotiations but without enforcement power. This observation by your full committee, Mr. Chairman, sets the context in which I approach the problem of remedies under Title VII of the Civil Rights Act of 1964. What the committee basically said to the full Congress was that EEOC had correctly determined that effective enforcement of Title VII required the elimination not only of intentional discrimination, but also of employment systems that excluded minorities and/or women and could not be justified by business necessity, and that, because employers would not change those systems voluntarily, EEOC needed enforcement power in order to achieve those changes. That was your Committee's recommendation, and similar language appeared in a Senate report.

Systemic Discrimination:

1. A Practice/System With An Adverse Impact
2. That Can Not Be Justified By Business Necessity

My entire approach to an analysis of the remedies situation is framed by that Congressional mandate. EEOC's remedial power was given to it by the Congress not only to eliminate intentional discrimination but also, and explicitly, to persuade employers to change discriminatory systems or face enforcement.

I should like to turn now to a very quick examination of the kinds of remedies that EEOC has, as I perceive it, historically sought in conciliations, consent decrees and court remedies and the remedies that courts have themselves imposed in cases brought either by EEOC or private parties.

I see the remedies falling into three broad categories, which I would describe as follows:

1. Make-Whole Remedies:

   Make-whole remedies are designed to make individual victims of discrimination, insofar as possible, whole; that is, to restore them to the situation that they would have held but for discrimination. These traditionally involve receiving the job or promotion which was denied and backpay covering lost wages for the period of denial due to discrimination, but they may involve many other things. They may be made available to a single victim of discrimination or to an entire class or group of victims.

2. Systemic-Change Remedies:

   Systemic-change remedies are those that identify and change discriminatory employment systems. If it is a violation of Title VII to have a system with an adverse impact that can't be justified by business necessity, then obviously the other side of the coin, the remedial side of the coin, is to implement a system that doesn't have an adverse impact and that equally well meets the employer's legitimate needs.

3. Numerical Remedies:

   Numerical remedies involve some form of measuring the number of individuals, in a remedial context, hired as a function of race, sex, national origin or some other ground covered by that statute.

I should like to turn to a more detailed discussion of numerical remedies, because that was the major focus of the committee's interest in setting up these hearings. To begin with, Mr. Chairman, the committee will note that I have used "numerical remedies" rather than referring to "goals and timetables" or "quotas" or any one of the other terms often

Categories of Remedies:

1. Make Whole Remedies
2. Systemic Change Remedies
3. Numerical Remedies

used. Although some might attempt to discredit this as a semantic exercise, I would label it a "semantic exercise" and use such a label as a compliment rather than an insult, for semantics is the science of meaning, and I think this is a situation in which our meaning must be extraordinarily precise.

A "numerical remedy" is something that is done to remedy discrimination, either voluntarily or under compulsion, and that focuses in some fashion on the number of individuals hired, promoted, etc. of a particular race, sex, or national origin.

This focusing can be all the way from merely counting in order to monitor what has been done to actually taking race, sex and national origin into consideration in making decisions. However, the courts have been extraordinarily careful in this latter use of a numerical remedy. It is important, therefore, to examine what the courts have done and more important what they have not done. Every Circuit Court of Appeals that has considered the matter, and all of them have done so, has perceived it as legal as part of a District Court's equitable powers under Title VII of the Civil Rights Act of 1964, to remedy discrimination in appropriate situations, to require that an employer hire from among qualified individuals on a ratio basis individuals of a particular race, sex, or national origin group. What the courts have never done is to require that individuals must be hired on the basis of race, sex, national origin alone without regard for qualifications.

Fairly recently, the Fifth Circuit Court of Appeals in the New Orleans case dealt with an argument that Title VII forbids such race- or color-conscious remedies by noting that such a position had been rejected by all the Circuit Courts of Appeals and that it was no longer entitled to "serious" consideration. While such a comment does not reflect my own personality -- I enjoy a good serious argument on any subject and I am always willing to reexamine my views on any subject -- it does indicate how clearly one court perceives the law.

Let me emphasize the way in which I have described these numerical remedies. I find no case in which any court in the United States has ordered any employer to hire individuals on the basis of race, sex or national origin alone without regard to qualifications. In all of the cases where a numerical remedy has been imposed, employers have been directed, from among qualified individuals, to hire on a ratio basis, in order to eliminate previous discrimination. To require the hiring of such individuals without regard to qualifications based on their race, sex, national origin alone in my judgement would be illegal, and I think all Circuit Courts would agree.

More important than what the Circuit Courts of Appeals have said about a race-conscious remedy is, however, what the Supreme Court of the United States has said, and to that

I now turn. In 1972, Chief Justice Warren Burger wrote for the Supreme Court in twin opinions dealing with North Carolina school discrimination matters. In one case he was dealing with a district court order that race be taken into account in remedying discrimination. In the other case he was dealing with a state law that attempted to make it illegal for school districts, even as a remedy, to take race into consideration. In the first case, when approving the District Court order assigning students on a race-conscious basis as a remedy for discrimination, Chief Justice Burger noted that, all things being equal with no history of discrimination, it would be desirable to have a student assignment system that is color blind, but he went on to say "that all things are not equal" where there has been a history of discrimination. He then stated that in situations where there had been a history of discrimination the remedy "may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness, and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school system".2/

In the other case, he wrote for the Supreme Court confirming a three-judge District Court holding that a state law forbidding assignment of students by race was

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2/ Swann v. The Board of Education, 402 U.S. 1, 28 (1972.)

unconstitutional. It was unconstitutional because it would forbid the precise kind of remedies that District Courts were ordering and that he had approved in the first case. The Chief Justice noted that just as race must be considered in determining whether a violation has occurred "so also must race be considered in formulating a remedy."[3]

I agree with the Chief Justice. In America, any remedy that is color-conscious might be administratively awkward inconvenient and even bizarre and may impose burdens on some; but I believe, and he does, that they are sometimes necessary to eliminate discrimination, and I believe, as he does, that they are legal.

This brings me to my final point, the policy argument for numerical remedies which I label the "deregulatory approach to remedying employment discrimination." I must ask the indulgence of the Committee in telling a short personal story. The story involves my official responsibilities at the EEOC in late 1960's and early 1970's. The events occurred in the context of a systemic definition of discrimination, which I have discussed with you and which is displayed on chart No. 1. If you look at this chart you will see that a governmental agency attempting to remedy discrimination by enforcement, or an employer attempting to deal with it voluntarily, can approach it from two directions.

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[3] North Carolina State Board of Education v. Swann 402 U.S. 43,46. (1972).

If the law is concerned that a practice or system with an adverse impact is illegal unless justified by business necessity, it is easy to see that an employer desiring to avoid a systemic discrimination finding, or a government agency desiring to remedy one, can focus on either one or both of the elements involved in systemic discrimination. The focus can be on the system or it can be on the impact.

If the focus is on the system, then an employer involved in investigation or litigation must attempt to persuade an investigator or court that his system meets the business necessity standard and to do so he must engage in a debate that will involve substantial government intervention into the details of how he runs his employment practices. Similarly, if a violation is found, an employer must then contend with either a bureaucrat or a court developing and ordering the adoption of an alternate system focusing on eliminating adverse impact, with the risk that the system, however well intended by the bureaucrat or court, may not really meet the employer's business need.

On the other hand, if the employer desires to avoid a debate of the kind I have hypothesized or avoid the kind of intervention in his practices that such an analysis would involve, he can shift the entire process by focusing on the adverse impact and attempting to eliminate it.

If he does this voluntarily and takes race into consideration, his actions, if appropriate, have been approved by the Supreme Court in the Weber case and (as several of the EEOC commissioners pointed out on Tuesdav) by the EEOC in its Guidelines on Affirmative Action.

If he waits until there is a legal proceeding, then a numerical remedy that allows him to focus on eliminating the adverse impact will minimize the government's involvement in these employment systems while achieving the goals of the statute. This approach has some problems and requires some care and some safeguards but before I turn to them, let me now tell you my personal story.

From 1968 until the early 1970's I was Director of EEOC's Office of State and Community Affairs. In this capacity, I was responsible for administering a program pursuant to which EEOC funded various state and local anti-discrimination agencies to assist EEOC in enforcing Title VII. I made recommendations to the Commission on the nature of projects that should be funded and, once the Commission made decisions, I was responsible for their implementation.

The Commission funded one series of projects that focused on identifying and eliminating systemic discrimination. State agencies that had access to EEOC's EEO-1 report system identified employers whose statistics indicated a substantial underutilization of minorities and/or women compared to their availability in the relevant labor market as measured by the utilization of other comparable employers. After appropriate backup research, employers so identified were investigated through the use of an agency's initiatory power to determine whether the underutilization was a result of discrimination or some other factor. If some other factor, a no cause decision was made. Where it was the result of systemic discrimination -- the employer was utilizing one or more employment systems that had such an exclusionary impact and could not be justified by business necessity -- the employer was asked to enter into a conciliation agreement to remedy that discrimination.

Now let me tell you about this conciliation agreement. It was one of the finest, most magnificant and creative conciliation agreements ever devised by any human being in the field of equal employment opportunity. Without being unduly modest I will tell the committee that it was brilliant. It was developed in part by Alfred Blumrosen, one of your next witnesses, growing out of his work as EEOC's first Director of Conciliations. It involved remedies that had been tried and tested by EEOC in its own cases and that were further tried, tested and perfected by the various state agencies working under the EEOC funding program. It contained one of the most comprehensive "systemic change remedies" ever developed, at least in the areas of hiring and recruitment. Its focus was to identify each of the systems that an employer might be using that had an exclusionary impact and could not be justified by business necessity, and to develop for that employer a detailed alternate system or set of systems that he could adopt in place of the discriminatory one(s).

We printed up this 10 or 20 page sample conciliation agreement and made it available to each of the state agencies we were funding. The phrase "made it available" is actually an understatement. We insisted that they impose it verbatim and without change upon every employer with whom they were negotiating a remedy. Very quickly this created problems. Employers became argumentative because somehow they did understand how brilliant we were and how imaginative and creative our agreement was. They did not like being told what to do. State agencies asked for flexibility in changing the agreement in order to meet such employer objections and to provide themselves a way to be creative in developing other systems by worrking with employers in their state.

The principle that we applied in dealing with state agency requests to modify the standard form conciliation agreement was to determine whether the state agencies and the employer with whom they were negotiating understood the underlying principle -- that a system with an adverse impact that couldn't be justified by business necessity had to be eliminated and a new system, eliminating the adverse impact, substituted. If we were convinced that they understood the principle we allowed them substantial flexibility in terms of what specific alternate system they worked out with the employer. In the course of several years of administering a program along these lines, I kept a record of the various areas of flexibility we had permitted to one or more state agencies in negotiating the agreement. I kept a master copy of the agreement in my desk and everytime a variance was negotiated I underlined the relevant section of the agreement and made a note in the margin concerning the flexibility that was involved.

After the program was two or three years old I was asked to conduct a training session for a group of new investigators who would be working for some of the state agencies being funded pursuant to the program, and I decided to focus on the remedial process as symbolized by this draft conciliation agreement and the various changes that different agencies had developed -- so they would understand both the principle and the need for flexibility in negotiations.

I took a clean copy of the agreement from the drawer, underlined the various sections, made 50 copies and used it as my training tool.

I promptly forgot about this particular document with the underlining until two additional years passed and a bright and ambitious job applicant appeared at my desk for an interview in connection with a vacancy. This individual worked for one of the contract compliance agencies and proudly brought with him a file full of compliance agreements for which he had been responsible. One of these agreements, Mr. Chairman and members of the committee, was, and I kid you not, almost verbatim the standard agreement we had made available to the states together with the underlinings I had placed there on my training copy. Yes, they had actually negotiated and obtained the signature of a federal government contractor on a compliance agreement that had these underlinings on the final, typed and signed version. Pretending I had never seen the document before, I complimented the job applicant on his excellent work and then asked him to explain the underlinings. Without hesitation he spoke of the underlinings (which I had included to indicate flexibility) by saying "oh that's easy, those are the important parts we had to make sure we kept in the agreement when we negotiated it."

Mr. Chairman, and members of the committee, that was the day in which my conversion to numerical remedies as an appropriate alternate approach to dealing with systemic discrimination was complete. To explain why that event played such an important part in my conversion to a believer in numerical remedies let me add a couple of details I have left out. That was the day on which the brilliance of our draft agreement was dimmed. That was the day on which I lost my confidence in my ability or that of any bureaucrat to train other bureaucrats to get involved at the remedial level in all of the complexities of how an employer operated his employment systems. That was the day on which I decided that a possible alternate goal of the remedial process should be the development of a context that put pressure on the employer to use his own expertise and familiarity with the functioning of his system to change the system so that the adverse impact was reduced or eliminated while the government's role was to enforce and monitor. I had spent at that point almost six years attempting to train some 200 state and local investigators (and I had been involved in a parallel process with EEOC staff) on how to understand employment systems and how to work with employers to develop remedial systems that would both meet the employer's legitimate needs and eliminate adverse impact thus remedying discrimination. That six years of trying to manage the process and trying to train investigator/conciliators had involved an often repeated process. We would develop a remedial approach at the staff level at EEOC headquarters. We would then develop a training approach and attempt to train the state and local agency staff. The focus, as suggested, was on how to develop and implement a remedy for systemic discrimination.

The problem was that, while many of the employees of the state and local agencies did an excellent job, often there were others who did not use the process well, and this meant there was a constant need for training.

To succeed they had to first master the concept of systemic discrimination. Second they had to develop an understanding of how an employer's systems actually worked and third they had to develop sufficient expertise in those systems to frame, suggest, and negotiate the implementation of systemic change on the part of the employers.

When the process did not work and state agency staff did poorly in negotiating remedies, we could assume that the problem was in part with our training program and that if we only explained things more clearly, staff would understand what was expected and implement it responsibly. Then new problems would develop and we were back to the drawing board again -- always on the assumption that if we just worked harder we could perfect things and the investigative and conciliation staff in the state agencies would implement what we wanted. Unfortunately, our analysis of the problem was faulty. Our approach to the negotiation of systemic remedies was not wanting just because we failed to train staff on how to change employment systems; it was wanting, also, because there are inherent problems in attempting to regulate to a level of detail that requires a government to reorganize many employment systems for many employers.

While Weber dealt with voluntary affirmative action, The Supreme Court's admonition in Weber that race-conscious affirmative action would allow an employer flexibility is equally applicable in framing a responsible deregulatory approach to race-conscious numerical remedies. Let me turn to an examination of how the Court analyzed the legislative history in focusing on what Congress wanted and on the way in which a numerical approach, carefully circumscribed, involves a deregulatory approach. I will simply list four quotes without elaboration to make the point.

1. A Congressional report, as quoted by the Court, urged that:

    > "Management prerogatives and union freedom . . . be left undisturbed to the greatest extent possible." H.R. Rep. No. 914, 88th Cong., 1st Sess., Pt. 2 (1963), at 29. (Emphasis added.)

2. The Court said that legislative history made clear:

    > "Congress' desire to avoid undue Federal regulation of private business." (Emphasis added.)

3. The Court concluded that:

    > "Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action." (Emphasis added.)

4. The Court said that prohibiting all voluntary race-conscious affirmative action would:

    > "Augment the powers of the Federal government and distinguish traditional management prerogratives while at the same time impeding attainment of the ultimate statutory goals." (Emphasis added.)

Again, while *Weber*, as these quotes indicate, was a voluntary affirmative action situation, what the Court said about minimizing "federal regulation" and giving room for "management prerogatives" and "business freedoms" appears to me to be equally applicable to a remedial approach and the goal that must be sought is a responsible regulatory approach that eliminates discrimination with the minimal interfence necessary.

In your letter inviting me to appear here today you asked that I address EEOC's present approach to these issues. From my attendance at your hearing Tuesday I sense substantial intellectual ferment as they struggle with these issues. It would be difficult for me to predict the end result of that ferment and given my own struggle years ago when I came to the conclusion that race-conscious numerical remedies were both good law and good policy, I understand how difficult it is to think this one through.

While I can not predict the result I have some thoughts to throw into that intellectual ferment and I offer them here in the hope that they may be of use to this committee and to the Commission:

1. We must always be clear what numerical remedies are and what they are not.
2. Numerical remedies have never mandated hiring unqualifized individuals. They should be limited to a ratios from among qualified individuals.
3. A numerical remedy, in and of itself, is not the answer. The goal is to get the employer to change the system that was

discriminatory. Numbers provide both a way for the employer to manage that process and a way for the government to monitor it.

4. Numerical remedies, while relevant as part of the evidence in determining whether an employer has eliminated discrimination, must never provide a safe harbor against subsequent claims of discrimination. EEOC's own Affirmative Action Guidelines caution -- §1608.11(b) -- that whether an employer who has taken affirmative action has done enough to remedy discrimination will remain a question of fact to be decided in each case. Equally obviously, an employer who has complied with a numerical remedy in a previous case, would expect, in a subsequent case arising out of different facts, to be judged on the facts of that new case.

5. Staff of anti-discrimination agencies should be cautioned not to mistake the purpose of a numerical remedy. This may seem like nitpicking, but a numerical remedy is not appropriate "to achieve parity" or "to increase the the employment of minorities

and women"; it is appropriate only to remedy discrimination.

6. In situations where there are identified victims entitled to relief, obviously numerical remedies are not a substitute for carefully crafted make-whole relief for those individuals unless they do, in fact, make the victims whole. However, in some situations numerical remedies and make-whole relief can perhaps go hand in hand.
7. In some situations there may be identified victims and yet only numerical remedies will serve to make them whole, as, for example, an employer whose system operated (through elements not meeting a business necessity standard) to exclude 500 blacks from even being considered for 25 vacancies. All five hundred can be identified by name and all five hundred are clearly identified victims. You probably can not mandate hiring all 500. Is a numerical remedy appropriate so that from those in the 500 who are qualified the employer

commits to hiring a certain number?

8. Numerical remedies should be carefully crafted and I can not write a manual or hornbook here. However, there is a good referance to which I would refer this committee, Mr. Chairman. EEOC participated, years ago, during the Ford administration in framing and adopting with a number of other federal agencies a policy on Affirmative Action. While originally directed towards voluntary action, it has a number of elements that are appropriate in making sure that numerical remedies are carefully crafted. I cite to this particular document because it is a part of two key EEOC Guidelines and because it had bi-partisian support. It was initially adopted in 1974 during the Ford administration and it was subsequently readopted during the Carter administration when it was incorporated as Section 17 of the Uniform Guidelines on Employee Selection Procedures and as section 1608.4(c)(1) of the Affirmative Action Guidelines. Several of the commissioners spoke on Tuesday of the importance of crafting any numerical remedies with great care given the sensitivity of the issue. I think this policy statement provides a useful

> resource for such crafting even though originally drafted for a different purpose. 29 C.F.R. 1607.17, 43 FR 38290, 38308 (August 25, 1978) and 29 C.F.R. 1608.4(c)(1), 44 FR 4422, 4429 (January 19, 1979.)

In conclusion Mr. Chairman, I believe that carefully crafted, judiciously used, professionally monitored, correctly understood numerical remedies are good law and good policy and are very consistent with the deregulatory policy thrust of this administration. They can be used in a way that implements the statutory mandate to eliminate discrimination while minimizing the interference of the courts and bureaucrats in the legitimate operations of business.

One final personal note. As Chairman Thomas has pointed out, we would not be holding these discussions if there had not been a history of discrimination that requires a remedy.

As I pointed out, I initially found the evolution of remedies in a color-conscious direction troubling because I perceived the goal of anti-discrimination legislation as color-blind. I was eventually persuaded that carefully crafted numerical remedies are good law and good policy to get us to that ultimate goal and I still believe it.

As Commissioner Alvarez pointed out, in his testimony, such remedies must be carefully crafted because of their inherent tension with the goals of the statute.

I sincerely hope this great country will eventually reach the day when both intentional discrimination and systemic discrimination are so diminished that color-conscious or sex-conscious numerical remedies will no longer be necessary, and I am confident that such a day will come.

I do not think it is un-American to ask whether that day has yet arrived, and I am not troubled by a debate on whether numerical remedies are still appropriate.

Neither do I do not think it is un-American for me to reply that I believe the day has not yet arrived, and that such remedies are legal and in some cases still appropriate and needed. It is not even un-American to say such a day is a long way off.

However, I carry with me the heavy burden of knowing that when a day does come -- and it will -- when I believe employment is so truly color-neutral and sex-neutral that numerical remedies are no longer needed it will take as much courage for me to stand up and say that as it took me twenty-three years ago in a southern/border state to travel across Missouri (two years before there was a Title VII) and stand up for the enforcement of anti-discrimination laws in an overtly hostile environment.

I hope when that day comes I will have that courage, and I hope that the debates which occur between now and then will be those of persons of good will with respect for divergent views so that there will be light but not heat by which I can continue to think about these issues.

I want to thank this Committee and all the other witnesses for contributing to that dialogue by these hearings. I wish to thank my fellow witnesses, the three EEOC chairs, Professor Blumrosen, and Bill Robinson, all of whom have been my professional colleagues and have in one way or another contributed to the evolution of my own thoughts and I want to thank the Commissioners of EEOC for the continued intellectual ferment that are bringing to this important issue.

I continue to believe that if people of good will such as those who have appeared at these two days of hearings continue to put their heads to these issues the nation will be well served.

92d Congress
2d Session } COMMITTEE PRINT

LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972

(H.R. 1746, P.L. 92-261)

AMENDING TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

PREPARED BY THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON LABOR AND
PUBLIC WELFARE
UNITED STATES SENATE

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92D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 92-238

EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971

JUNE 2, 1971.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. HAWKINS, from the Committee on Education and Labor, submitted the following

REPORT

together with

MINORITY AND SEPARATE VIEWS

[To accompany H.R. 1746]

The Committee on Education and Labor, to whom was referred the bill (H.R. 1746) to further promote equal employment opportunities for American workers, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF LEGISLATION

The basic purpose of H.R. 1746 is to grant the Equal Employment Opportunity Commission authority to issue, through well established procedures, judicially enforceable cease and desist orders. The bill would transfer the functions and responsibilities of the Office of Federal Contract Compliance (now in the Department of Labor—pursuant to Executive Order 11246) to the Equal Employment Opportunity Commission; and transfer the Attorney General's authority in practice or pattern discrimination suits to the Equal Employment Opportunity Commission. The bill would broaden jurisdictional coverage by deleting the existing exemptions of State and local government employees and of certain employees connected with educational institutions. The bill would extend some protection to Federal employees. One year after enactment, coverage is extended to employers and labor unions with eight or more employees or members, a reduction from the present requirement of 25 employees or members.

MAJOR PROVISIONS OF THE BILL

CEASE AND DESIST ENFORCEMENT POWERS

During the preparation and presentation of Title VII of the Civil Rights Act of 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization. It was thought that a scheme which stressed conciliation rather than compulsory processes would be more appropriate for the resolution of this essentially "human" problem. Litigation, it was thought, would be necessary only on an occasional basis in the event of determined recalcitrance. Experience, however, has shown this to be an oversimplified expectation, incorrect in its conclusions.

Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing and validation requirements.[1] The forms and incidents of discrimination which the Commission is required to treat are increasingly complex. Particularly to the untrained observer, their discriminatory nature may not appear obvious at first glance. A recent striking example was provided by the U.S. Supreme Court in its decision in *Griggs* v. *Duke Power Co.*, —— U.S. ——, 91 S.Ct. 849, 3 FEP Cases 175 (S.Ct. 1971), where the Court held that the use of employment tests as determinants of an applicant's job qualification, even when nondiscriminatory and applied in good faith by the employer, was in violation of Title VII if such tests work a discriminatory effect in hiring patterns and there is no showing of an overriding business necessity for the use of such criteria.

It is increasingly obvious that the entire area of employment discrimination is one whose resolution requires not only expert assistance, but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful.

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[1] See, e.g., Note.—80 Harv. L. Rev. 1260 (1967); Cooper and Sobol, "Seniority and Testing Under Fair Employment Laws: A General Approach To Objective Criteria of Hiring and Promotion," 82 Harv. L. Rev. 1623 (1969); Blumrosen, "The Duty of Fair Recruitment Under the Civil Rights Act of 1964," 22 Rutgers Law Review 465 (1968); Sovern, "Legal Restraints on Racial Discrimination in Employment" (1966); "Bonfield, the Substance of American Fair Employment Practices Legislation I and II," 61 and 62 Northwestern Law Review 707 and 19 (1967). See also *Quarles v. Philip Morris*, 279 F. Supp. 505 (E.D. Va., 1968); *United States v. Local 189, United Papermakers* 282 F. Supp. 39 (E.D. La., 1968), 416 F. 2d 980 (C.A. 5, 1969); *Asbestos Workers, Local 53 v. Vogler*, 407 F. 2d. 1047 (C.A. 5 1969) and cases cited therein.

This kind of expertise normally does not reside in either the personnel or legal arms of employers, and the result in terms of conciliation is often an impasse, with the respondent unwilling or unable to understand the problem in the way the Commission perceives it. As we have already noted, the Commission has been able to achieve successful conciliation in less than half of the cases in which reasonable cause was determined. It has been the emphasis on voluntariness that has proven to be most detrimental to the successful operation of Title VII. In cases posing the most profound consequences, respondents have more often than not shrugged off the Commission's entreaties and relied upon the unlikelihood of the parties suing them.

Facts, statistical evidence and experience demonstrate that employers, labor organizations, employment agencies and joint labor-management committees continue to engage in conduct which contravenes the provisions of Title VII. The existence of such practices demonstrates the immediate need to effectuate the purposes of the Civil Rights Act of 1964.

H.R. 1746 remedies the failure to include effective enforcement powers in Title VII by enacting a new section 706 (section 4 of the bill) which empowers the Commission, after it has exhausted the procedures for achieving voluntary compliance, to issue complaints and hold hearings, to issue cease and desist orders against discriminatory practices, and to seek enforcement of its orders in the Federal Courts. Comparable powers are now exercised by most Federal regulatory agencies, the Federal Communications Commission, the Federal Trade Commission, and the National Labor Relations Board, to name a few, as well as the vast majority of State Fair Employment Practice Commissions. By providing this expansion of Title VII authority, we will remove present shortcoming of the act and provide a quick and effective remedy against employment discrimination.

The Washington Post
OUTLOOK
Sunday, November 10, 1985

add to (PR)

Why Bosses Like to Be Told To Hire Minorities

By Peter C. Robertson

PRESIDENT REAGAN is being urged to weaken enforcement of affirmative action programs for federal contractors. The proposition has divided the Cabinet, stalling action. But if Reagan still is trying to make up his mind, here's a message from the business community: Go slow.

Although business has major problems with the program, it now supports the basic principles of affirmative action as implemented under Presidents Kennedy, Johnson, Nixon, Ford and Carter.

The reasons corporations are not interested in seeing those principles weakened have more to do with business than with civil rights. Business — led by the National Association of Manufacturers — sees that its own self-interest requires affirmative action. And if the Reagan administration thinks American business will thank it for weakening affirmative action enforcement, then the administration isn't listening to what businessmen outside the Beltway are saying.

The government's present affirmative action program requires companies doing business with the federal government to have written affirmative action plans including goals and timetables to increase the employment of qualified minorities and women where they are "under-utilized." Press reports indicate the administration may no longer require goals and timetables and might even prohibit their voluntary use as a management tool.

There are at least 10 good reasons that business, while seeking administrative reforms, might take a position that voluntary goals and timetables should continue to be allowed and government should have some kind of mandatory program.

1 *Changing Labor Market.*

Women and minorities will be 75 percent of labor force growth between 1990 and 2000. Employers without plans to eliminate barriers to hiring or promoting those groups will be cut off from a major part of America's labor force.

C.W. Parry, chief executive officer at Alcoa, recently sent a memo to all employes noting that Alcoa's "best prospects for survival and growth lie in our skillful selection of the best individuals" from a "broad-based talent pool that includes women and minorities."

2 *Minimizing Risk of Reverse Discrimination Suits.*

In a recent survey of chief executive officers by the management consulting firm for which I work, 95 percent indicated that they will use numbers as a management tool to measure corporate progress whether the government requires them or not. However, once the government requirements are gone, there would be a risk of so-called "reverse discrimination" suits alleging that employers have gone too far with affirmative action.

The continuation of a responsible and balanced government program that sanctions goals and timetables will make it less likely that such suits will be successful, according to National Association of Manufacturers President Alexander Trowbridge.

3 *Compatibility with Management.*

The use of goals and timetables and other numerical measures to track the employment of minorities and women is consistent with how corporations deal with all important areas.

In recent meetings with more than 150 companies, the consistent question we were asked was "If we can't count, how can we measure? If we can't measure, how can we manage?"

William McEwen, director of equal-opportunity affairs at Monsanto Co. in St. Louis and chairman of the human resources steering group of the NAM, told a House of Representatives subcommittee in July that "business . . . sets goals and timetables for every aspect of its operations — profits, capital investment, productivity increases and promotional potential for individuals. Setting goals and timetables for minority and female participation is a way of measuring progress and focusing on potential discrimination."

Senior corporate officials clearly recognize that managers must be measured on all of the things they are expected to do.

A survey of more than 200 major companies found 76 percent saying they used "voluntary internal numerical objectives to assess [equal employment opportunity] performance." One-fourth of the companies said that incentive compensation plans for managers include equal employment objectives and that performance against those objectives can affect incentive payments positively or negatively. By 1988 more than half the companies predict they will be basing incentive pay in part on EEO performance.

4 *Use of Numbers as a Defense.*

One proposal might eliminate the possibility that businesses could use goals and timetables even voluntarily or point to progress in minority and female employment as part of the evidence in defending against discrimination charges, although the Supreme Court has emphasized the appropriateness of such a defense. Employers clearly want to use their progress as a defense and to be able to

Why Bosses Like Affirmative Action

avoid further government investigations of their activities if they have done well, as measured by the numbers of minorities and females they employ.

At the same time, the program does not require any quotas. The goals and timetables program is a flexible one that business can live with. Ralph P. Davidson, board chairman of Time, Inc. told Congress that at "no time [was his company] subject to anything resembling 'quotas' [and that they] weren't presented with rigid, predetermined statistics for the hiring of women and minorities." He said that the government never tried "to dictate a final, inflexible result."

5 *State and Local Government Programs:*

Historically, large companies opposed federal regulations pleading states' rights. However, today they prefer the uniformity of a single federal regulation, even if the companies don't always like all the details, to having to meet a multiplicity of state and local regulations.

One national financial services company presently has affirmative action programs with 60 local jurisdictions, each of which calculates its requirements differently.

Recently, NAM President Trowbridge has noted that if states and cities believe the federal program is inadequate, it could lead to a proliferation of "conflicting and complicated standards" that "are bound to cost more ultimately and result in less effective programs." Trowbridge has called for reforms in the federal program without amending the underlying executive order. The NAM believes that such amendments would be "ill-advised," in part, because they might trigger such state and local action.

6 *Avoiding Inflexible Federal Legislation:*

Employers are concerned that Congress might freeze the present program into law and thus deny flexibility to alter the regulations. Rep. Augustus F. Hawkins (D-Calif.), chairman of the House Education and Labor Committee, has pledged legislative action should the executive order be weakened. He would probably get bipartisan support in both houses. Sen. Robert Dole (R-Kan.) urged the president not to weaken the new executive order and congressmen and senators of both parties have written him strong letters supporting a similar position.

7 *Employe Morale and Productivity:*

Companies who have made significant progress in hiring minorities and women would have morale and productivity problems if their employes believe that the federal government is reducing its commitment to affirmative action, particularly if they believe that business pressure led to such a change.

For example, IBM now has 30,000 minority employes and 30,000 women who would not be there if the company's percentage of minority and female employment was the same as it had been in the early '60s. Such a company needs its employes to think affirmative action is being eliminated like it needs a corporate hole in the head. In fact, IBM's chief executive officer, John Akers, just issued an IBM-style, 16-page report on its affirmative action program with statistics and a description of the company's programs to achieve these gains. Similar reports have been issued by others: Schering-Plough, Philip Morris, Exxon, AT&T, Westinghouse and Chemical Bank to mention just a few.

The Alcoa memo noted that Alcoa would continue its programs "whatever the government's eventual position." In a similar vein, Davidson, of Time, Inc., told a House Judiciary subcommittee this week that "when press reports indicated that [the presidential order on affirmative action] might be weakened or watered down, Time, Inc. issued a statement [that] 'should this happen, we want to assure you we will maintain our affirmative action program. We have been well served by that program, including the setting of internal hiring and promotion goals for minorities and women. . . .' "

8 *Faith in the Legal System:*

Corporations have a vested interest in our legal system and citizen faith in that system. Laws prohibiting discrimination were preceded by demonstrations by those who had no faith that we could solve our problems by law. President Kennedy wanted to achieve civil rights under law. The late Republican Sen. Everett M. Dirksen (R-Ill.) spoke of "an idea whose time had come" and helped achieve Kennedy's dream of getting the problem out of the streets and into the courts. Employers may argue with how government regulations are applied but they would rather have these arguments occur in a legal framework than in the streets.

9 *Third Party Pressures:*

If faith in the ability of the legal system to increase employment opportunities were to fade, we may not see marches in the streets again, but we will certainly see increasing pressure on employers from outside the legal system. Already, private civil rights organizations have substantially increased their demands for affirmative action plans or fair share agreements outside the context of government requirements. Most employers would prefer to deal with the government, even when perceived as slightly misguided, than to negotiate the details of how they do business with a wide variety of competing private groups whose standards are not subject to judicial review.

10 *Management Flexibility — The Deregulatory Issue:*

This is perhaps the most important reason employers favor continued use of voluntary goals and timetables and even support appropriately crafted mandatory ones. NAM president Trowbridge made the point when he pointed out that retaining flexible goals and timetables as a measure of good faith compliance to ensure progress would "give business the necessary guidelines to ensure compliance with federal mandates," and pointed out that "absent such guidelines, individual enforcement officers will be left with decisions as to what comprises compliance with affirmative action."

The present rules mandating goals and timetables were adopted by the Nixon administration, in part at the request of business, in essence as a deregulatory move in the area of employment discrimination and affirmative action.

Under pre-Nixon programs, there were major confrontations with government investigators concerning the adequacy of specific details in corporate affirmative action programs. The Nixon pro-business, deregulatory approach was to adopt goals and timetables as an objective measure of corporate progress and thus eliminate many of the arguments about the adequacy of specific programs. In fact, in the lead Supreme Court decision approving race-conscious affirmative action

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using numbers, the court said that such approval was given in part because of this deregulatory aspect. The court noted that to allow appropriately circumscribed race-conscious affirmative action would permit employers to comply in accord with "traditional management prerogatives" and was consistent with the congressional desire to implement anti-discrimination requirements in a fashion that would "avoid undue federal regulation of private businesses."

It would be ironic indeed if an administration known for its deregulation program and its desire to help business were to go in the exact opposite direction in dealing with affirmative action. The president ought to think twice before eliminating a program begun under a Republican president with business support and originally implemented by George P. Shultz when he was Secretary of Labor.

The president ought to think twice before eliminating an objective numerical measure and substituting bureaucratic examination of the details of employers' practices to see if they meet government standards. He ought to think twice before doing something that might lead to a proliferation of competing and uncontrollable pressures on business from state and local governments and civil rights groups, and he should certainly think twice before taking a step that much of his own business constituency believes is ill conceived.

Peter Robertson, a former senior official with the Equal Employment Opportunity Commission, is a management consultant with Organization Resources Counselors, Inc.

Mr. MARTINEZ. Thank you. That's a very interesting point. Conversely though, the administration has set out to prove that goals and timetables are in effect quotas and quotas do cause reverse discrimination. In that regard, on page 14 of your testimony, you underlined, "I find no case in which any court in the United States has ordered any employer to hire individuals on the basis of race, sex or national origin alone without regard to qualifications," but continually we hear that charge by this administration, by Edwin Meese and Brad Reynolds and Chair Thomas, that timetables and goals do create reverse discrimination.

Repeatedly, we've asked them to provide us with evidence of even specific cases where this has happened, and yet here in your testimony, you say you know of no case that this has been done, no court case that has ordered that. That is our contention, that nowhere are we looking to displace somebody who has qualified for a job and who has enjoyed that job and is doing that job in a manner which is of contract to him and the employer; just to simply put somebody else there to remedy somebody's past discriminations.

What we have asked for is that there be some systematic way of eradicating those past discriminations. That's simply all we're asking for, and that's all timetables and goals really does in my estimation.

So I find it interesting that you state that. Would you amplify for us in your position there that no court case has ever ordered what the administration has called reverse discrimination?

Mr. ROBERTSON. Well, I, like you, Mr. Chairman, have on numerous occasions asked others to provide me with cases that would challenge or contradict my assertion. In fact, I do a great deal of training and speechmaking on this subject, and I finally developed a rather ironic way of approaching it which some find a little weird, but I plead guilty, and that is to offer a reward for somebody who could find me such a case.

I started out by offering $100 reward, and each time I made the offer and didn't get a case, I'd increase it $1, and I've gone from $100 up to $287. So I'll make that offer again, although I'm not making it a little more publicly than I've ever done so, and I suspect, Mr. Chairman, in all candor someday, somebody will find a case, and lest you think that will change the arrogance of my assertion, I will then waive a document in the air, and say at the end of 20 years they only found one case, but I will have to pay off the reward.

Mr. MARTINEZ. Very good. One of the questions I asked the previous panel, and you were here, and you heard, was the impact that this administration has caused by this debate of the use of timetables and goals. What I would ask you is what impact this administration has had on employers in implementing their affirmative action plans, particularly in regard to the timetable involved?

Mr. ROBERTSON. Well, I don't mind an appropriately crafted debate on any issue. I think there's no question before us that can't be continually reexamined, but there have been some things quoted in the public press. Maybe I can answer it this way, again with a little irony. I consult on equal employment opportunity and affirmative action, and occasionally I will meet an old friend or a cousin that I haven't seen for a while, or a college or law school classmate, and they'll ask me what I do, and I said that I consult on affirmative action. They'll look at me with that sort of sad Maytag repairman look that I must be the loneliest man in town, and I reply that nothing could be further from the truth. What has happened is that senior management is 100 percent convinced, as I see it in the private sector and the large corporations that I work with, that affirmative action has to stay on track. In fact, I did an article from the Washington Post on that, and if it's not overly imposing on your good graces, I'd like to add that. I should have put it at the end of my testimony, and I did not do so.

Mr. MARTINEZ. There being no objections, so ordered.

Mr. ROBERTSON. But the irony is that senior management wants to keep these programs on track. Lower management reads in the newspaper some of the more flamboyant speeches that lead one to believe not that the law is being debated, but that it has been changed. I don't mind the debate. I do mind the assertion that it has been changed when it has not.

They read in the paper these statements that the law has been changed. Lower level management turns within the corporation and says, that means we can stop doing it, and then the senior managers have to hire us to help keep the program in line. So in an ironic way, we've benefited from some of the debate, but I'm not sure I like that particular benefit, Mr. Chairman.

Mr. MARTINEZ. I, like I say, was impressed by your written testimony, and by your oral testimony, but there is something in your testimony that I think I'd like to point out before I turn to Mr. Gunderson. You stated, and I want to quote it exactly as you did in your testimony, "In attempting to responsibly implement the statute passed by the Congress, one must go back to the fundamentals that identify the nature of the problem."

Later in your written testimony, you said that Congress pointed out in its report that the original discrimination act was originally perceived as involving only those things that an employer did intentionally to exclude individuals because of race, sex, national origin, or other prohibited grounds.

The report pointed out that employment discrimination had to be viewed; this is extending from the report, not in the report, had to be extended to a far more complex phenomena, and that experts generally describe the problems in terms of systems and effects rather than simply intentional wrongs, and that's where this current EEOC Commission has gone by the wayside in not understanding that or even holding that as a part of the perception, even though in your testimony, you quote Chairman Thomas who says, "Affirmative action was not created in a vacuum and was not created in a color blind society. It must be remembered that affirmative action has been put in place, because minorities and women have been discriminated in the past." The process, affirmative action, timetables and goals included in there, is simply to do that, eliminate that discrimination that has been placed in the past.

Like I say, I hope you don't mind plagiarism, because at times, I will be using part of your testimony here to refer to things in my speeches. With that, I'll turn to Mr. Gunderson.

Mr. GUNDERSON. Thank you, Mr. Chairman. I want to thank Mr. Robertson as well, and ask him if now the reward is up to $288 being Mr. Martinez didn't respond.

Mr. ROBERTSON. Yes, sir.

Mr. GUNDERSON. Just checking. I would like to ask a question. A little bit earlier in your testimony, about a page earlier than what the chairman was referring to——

Mr. ROBERTSON. What page are you on, sir?

Mr. GUNDERSON. Page 5. "I believe that both law and policy support the limited use in appropriate situations of what I call numerical remedies." I'd like you to elaborate on what you mean by limited use of numerical remedies. I don't know, I guess that may give me some suggestion that there may be a middle ground to compromise between what is the administration's perception of numerical remedies, and I think what many of us believe, that perhaps we need to better define. So I'm just searching for your enlightenment on what you mean by that.

Mr. ROBERTSON. I will relate your question and my answer to your earlier comment about the bipartisan nature of this process. I was very pleased to see two former chairs of different parties and to see both parties represented here.

We struggle with that issue on numerous occasions at EEOC starting in the Ford administration, and rather than write a hornbook to answer your question now with the bells ringing and other witnesses, I would say that under the Ford administration, four Federal agencies drafted a set of guidelines on appropriate affirmative action.

During the Carter administration, when new regulations were issued, those guidelines were carried forward verbatim in the two major sets of EEOC guidelines, and I cite toward the end of my testimony with specific cites to the Federal Register, the EEOC guidelines on affirmative action and the uniform guidelines on employee selection procedures, both of which picked up this bipartisan four agency agreement on what were appropriate standards. Now we were focusing in the context of voluntary affirmative action, but the balancing that we went through to try and find that responsible middle ground seems to me to be equally applicable to the enforcement context, and rather than give you the hornbook today, I would commend to your attention that document which as I said, has a long history, multiagency, both parties incorporated in a number of different documents.

Mr. GUNDERSON. I'll conclude, Mr. Chairman, in the interest of time, but the staff keeps reminding me that I need to ask unanimous consent to insert a statement of my own at the beginning of the record of today's hearing, and I'd like to do that.

Mr. MARTINEZ. The chair will make no objection. So ordered.

Mr. GUNDERSON. Thank you.

Mr. MARTINEZ. Let me ask at this time. We have a little bit of time. I don't think we have to leave for the 10-minute buzzer. Would you like to start your questioning, Mr. Chairman?

Chairman HAWKINS. I have only one. Mr. Robertson, you touched briefly on the law and cited a few appeals court opinions and Supreme Court opinions throughout your statement on the legalities of the race conscious affirmative action remedies. All the cases cited came before *Stotts*. I'm wondering in view of *Stotts* in particular, would you in anyway change the thinking that preceded *Stotts* and the cases that you've cited?

Mr. ROBERTSON. Chairman Hawkins, again, without writing an article or a hornbook, there are two thoughts about *Stotts* that lead me to my conclusion. First, I don't think *Stotts*, even in the majority opinion changes the law in numerical remedies. I think it holds two things. One is a deal is a deal. That's the first principle. They were dealing with a consent decree, and the district judge had tried to deviate from it, and the Supreme Court was saying you can't do that.

Second, they were dealing with the seniority situation, and in an earlier case, the *Teamsters* case, the Supreme Court had struggled with the issue of whether the systemic discrimination concept applies to seniority systems. Numerous courts had applied it to seniority systems, and the Supreme Court was saying basically that it does not apply to seniority systems.

Citing the appropriate section of the statute that protects bona fide seniority systems, they actually said that if it were not for that section, seniority systems would be covered by the *Griggs* principle, but that section being in there, the court said in *Teamsters* that you can't attack seniority systems. What they said in *Stotts* is, A, a deal is a deal, and B, hey, we meant what we said in *Teamsters*. You can't mess with seniority systems under title VII. Now if you don't accept that reading of the majority opinion, you still don't get five votes to defeat numerical remedies because O'Connor in her concurring opinion goes out of her way to disassociate herself from the dicta of the court on the race conscious issue.

You've got to read it very carefully, because there are some sentences where there are footnotes, and it refers back, and the things we lawyers do that entitle us to pretend we're better than other people, but in the process, she's looking at that *Teamsters* language on seniority and saying that she doesn't think that you can have race-conscious remedies in seniority situations, but she's still preserving, as I read it, her right to preserve the *Weber* language in voluntary situations and to have numerical remedies in other situations that don't involve bona fide seniority systems. So the quick answer to your question is I don't think *Stotts* changes one thing, sir.

Chairman HAWKINS. It was on this fine point that Mr. Thomas defended his action as being justified, and I think also indicated that until the court would reverse that position, that he felt justified in continuing their deviation from goals and timetables, so I assume you're disagreeing with this?

Mr. ROBERTSON. To the extent that Chairman Thomas——

Chairman HAWKINS. His reliance on it.

Mr. ROBERTSON. If he relies on *Stotts* as preventing numerical remedies, I would respectfully disagree with him, sir.

Chairman HAWKINS. Thank you.

Mr. MARTINEZ. Mr. Hayes has just one brief question and then we'll recess.

Chairman HAYES. Just one brief question. I don't want to hold the witness till our return. You've spoken of the positive aspects of numerical remedies. Are there any negative aspects that you know of?

Mr. ROBERTSON. I think as Commissioner Alvarez pointed out in his testimony Tuesday, we started out with a colorblind approach, and there is an inherent tension between numerical remedies that take race into consideration and a statute that says don't discriminate. In the *Weber* case, the Supreme Court struggled with that issue and clearly decided that the term discrimination, as included in title VII by the Congress looking at congressional history, did not include race conscious action of this type.

At the same time, we must craft what we do very carefully because of the inherent tension, and we must always make it clear when we pose numerical remedies that what we are doing is remedying discrimination. Occasionally, Congressman, people get sloppy in their talk, understandable but sloppy. They will say, well, we put a numerical remedy in the case to raise minority employment to parity, or they will say we put a numerical remedy in a case to increase the employment of minorities and women. That's the end result, but greater precision, it seems to me, is appropriate. We put it in there to remedy discrimination, sir.

Mr. HAYES. Thank you very much.

Mr. MARTINEZ. Thank you very much, Mr. Robertson. It's a pleasure to hear you and read your testimony, and it has been very instrumental in an education to myself and maybe some of the other members. I appreciate it. Thank you.

Mr. ROBERTSON. Thank you, Mr. Chairman, and members of the committee.

Mr. MARTINEZ. We will return in 10 minutes.

[Recess.]

Mr. MARTINEZ. First member of the panel of Professor Alfred Blumrosen, professor of law, school of law, Rutgers University; William Robinson, executive director, Lawyers Committee for Civil Rights Under Law; Judith Vladeck, Esq. of Vladeck, Waldman, & Elias Englehard, plaintiff's attorney, *MacMillan* case; and, Gregory K. Hiestand, Esq., Epstein, Becker, Borsody & Green, P.C. Thank you. We'll start with you, Professor. My staff director is telling me that we have an order we have to follow. Professor Alfred Blumrosen, would you begin?

STATEMENT OF PROF. ALFRED BLUMROSEN, PROFESSOR OF LAW, SCHOOL OF LAW, RUTGERS UNIVERSITY

Mr. BLUMROSEN. Thank you, Mr. Chairman. I appreciate the opportunity of coming back to this committee to discuss another aspect of the EEOC's activities. I've been a professor at Rutgers Law School for some 30 years, and have been intimately involved in the Equal Employment Opportunity Commission's activities since 1965 when I came down to help set up the agency and served as its first chief of conciliations and negotiated the first agreement that began to move toward having objective standards to measure performance, the Newport News Shipyard Agreement in 1966.

I have served every administration, Democrat and Republican, up to 1981. I listened to the testimony, as you did, on Tuesday, and I think that testimony exposed two fundamental errors on the part of the present Commission. First, and in my view most important, it described a process of government by innuendo where responsible officials skulk in the corridors of power hoping that the staff will intuit what they want them to do rather than give directions.

It reminded me of two literary illusions if I could take a second on them. One is of T.S. Eliot's "Murder in the Cathedral," where Henry II says, "Will no one relieve me of this burden," the burden being Thomas of Beckett, and then four assassins rush out and kill Thomas of Beckett, but no orders were even given to do it.

The other is the introduction to a very famous television program called "Mission Impossible" where there's tape recorded instructions to the main character, and then the tape says, if you're caught, the Secretary will disavow any knowledge of your action, and then the tape self destructs. I don't know which of those is more appropriate to describe the matter that was presented to you, but one of them certainly fits.

Second, the Commission's portrayed an erroneous picture of the policy of the Equal Employment Opportunity Commission. The Commission has a policy on goals and timetables which includes the use of goals and timetables in court decrees that result from litigation. That policy is expressed in a number of documents, some of which Chair Norton referred to, but particularly in the affirmative action guidelines which were adopted after notice and comment proceedings under the Administrative Procedure Act, and, in my view, have the force of law.

So what we had was an illustration of Government by magic. They simply caused the history of the policies of the agency to disappear and then saying since there is no policy in the vacuum, it's appropriate for the general counsel to exercise some kind of prosecutorial discretion.

I'd like to address briefly both of those issues, and I realize time is short. The affirmative action guidelines, as I say, were adopted after notice and comment and may well constitute substantive rulemaking. The only area in which the Commission has the power to finally determine rights by rulemaking is in connection with 713(b) that was referred to.

The introduction of those guidelines states, "It is the Commission's interpretation that appropriate voluntary affirmative action or affirmative action pursuant to an administrative or judicial requirement does not constitute unlawful discrimination in violation of the Act." That's in the introduction to the guidelines.

Section 1608.8 of the guidelines, without quoting it, it's in a footnote on page five of my testimony, establishes that an employer who is complying with court ordered goals and timetables is entitled to rely on these guidelines as a defense against a reverse discrimination claim.

The guidelines also state, to deal with another issue that was regularly raised in this matter, that goals and timetables may provide "opportunities for members of groups who have been excluded regardless of whether the persons benefited were themselves the victims of prior discriminatory practice." That's laid out in this document.

The guidelines in the introduction reject as unfair the decision of the court of appeals in the *Weber* case. That decision in the *Weber* case held that you could only use goals to benefit an identified victim of discrimination so the Commission rejected that view in its guidelines and thereafter the Supreme Court also rejected that view in its decision in the *Weber* case. In light of this history, it's clear that there is in fact an articulated and binding Commission policy favoring and supporting the use of goals and timetables in litigation. Now, finally they even suggested that the general counsel had some kind of independent authority to change a rule because of his intuition as to what the Commissioners would do. I think Mr. Clark has dealt with that. I would only add that if Mr. Clark is right, the Commission is wrong.

Some 35 years ago, this same issue came up before the National Labor Relations Board when there was a difference of view between the Board and the general counsel, and the Board ruled that the general counsel had to follow its policy, and that was upheld in the Court of Appeals back in 1951.

So given there is a Commission policy, as I've suggested, the general counsel simply has no authority to proceed in a way that's contrary to it. Second, and this is a matter, I think, of sufficient concern that perhaps the judiciary committee as well might be concerned, this is not a matter peculiarly related to affirmative action or even to the whole general area of the Government's view on civil rights generally.

This goes to the question of public participation in government. The EEOC has operated in a spotlight ever since its beginning. The Newport News agreement that I described to you was made public with the consent of the company. It was severely criticized. Copies of it were introduced into the Congressional Record in the Senate. It was defended in the Senate by Senator Javitz whose work in the field of civil rights will, I think, be one of his lasting memorials, and it was part of the public debate about how we go about enforcing the Equal Employment Law, and that public debate and doing things publicly has simply been a tradition in this field from the very beginning.

When the Commission began, it chose to issue guidelines on a number of matters, instead of deciding things on a case-by-case basis so that the public could understand the Commission's general view on a larger number of matters.

The goals and timetables issue was discussed, as Mr. Robertson indicated, in the legislative debates leading to the 1972 amendment, part of an ongoing discussion, and as Commissioner Norton indicated, even Mr. Reynolds, whatever one may have of his views, has proceeded openly to take a position on the issue. In the spring of 1984, at a meeting of the labor employment law section of the American Bar Association, I asked Mr. Reynolds in front of God and 150 lawyers how he could justify his position on affirmative action in light of the affirmative action guidelines.

According to my recollection into a report published at that time in the Daily Labor Report, he agreed that these regulations had the force of law, but he didn't think the Department of Justice was bound by them. Well, that's a different problem.

Mr. Reynolds, no great supporter of affirmative action, at the same time said it would be unthinkable for the EEOC or the OFCCP to disregard their published regulations without going through the appropriate procedures for their modification, so I think we're in a situation where Mr. Reynolds would not have functioned the way the EEOC has functioned.

Chair Thomas, Tuesday, spoke to you in words that gave you some idea about his view of the right of public participation in the processes of the EEOC. He states to you that policy should not be developed in reaction to public furor, and that he wished in policymaking to stay above the maddening crowd. Well, the maddening crowd is we the people, and the public furor is that wholesome, frank and vigorous debate that shapes and informs governmental action in a democracy.

Chair Thomas' position is essentially to disregard public concerns by taking action where the public can have no choice. That is administrative error. It's contrary to the policies of the Administration Procedure Act and the Sunshine Act, both of which move in the direction of public participation. I think the EEOC has violated both of those statutes. It's a well settled rule of administrative law, that Government agencies are bound by their own regulations until they are revised through proper procedures. The APA requires that substantive regulations if issued after notice and comment be modified through the same process.

The failure of the EEOC to announce the proposed change in the affirmative action guidelines and subject to that proposal to public examination is thus a violation of the APA. Now the only way, as Chair Norton indicated, the only way the Commission has ever acted with respect to changing regulations and guidelines is by a vote of the Commission at a meeting which it's then itself subject to the Sunshine Act which means the meeting has to be public. There has to be advance notice of the meeting so that the public can attend.

So if the Commission were to proceed to comply with the Administrative Procedure Act's requirement of publication of notice and comment, they would have to hold a meeting to do that, which would be subject to the Sunshine Act, and the public would thus have an opportunity to understand what the Commission is planning to do and to take some kind of action.

This analysis does not depend on one's views about goals and timetables of affirmative action. I assume for the purposes of what I have just said that the EEOC may have the power by going through proper procedures to adopt a new view that is less supportive of goals and timetables.

That's another matter that could be litigated and discussed separately. I'm assuming it for this purpose though, because the point I'm making has to do with procedure, that if they want to do that, they have to do it through open public action. The preliminary steps leading to it should not be permitted to be in private.

I've participated in a lot of rulemaking activity in the Federal Government over the period that I've served, and I know how important it is to get the free and full information that you want to have confidentiality in the preliminary discussion. That's very appropriate. That gets you better government. That gives you sensitive government, because people will talk in private when they won't talk in public.

But, it's justified only if at the end of those preliminary private discussions, you have public deliberation and public action. That is what, if you don't have that, then we have secret government. Just as our legislators must ultimately cast their votes in public, our administrators must make their views and positions known through proper procedures. Without that assurance, the underlying faith in the basic integrity of governmental process is eroded and without that faith the republic is in jeopardy. In a simpler time, we used a slogan that we were a government of laws and not of men.

What we meant by that was that we did not allow those who happen to fill seats of government exercise unfettered discretion to do whatever they want. The point it still valid. Our world is more complex, and government is more complicated, but secret government is anathema to a democratic society.

If the Commissioners wish to change EEOC policy, perhaps they can do so, perhaps not, but they can't do it through the process that was described to you on Tuesday. Thank you.

Mr. **Martinez**. Thank you, Mr. Blumrosen.

[The prepared statement of Alfred W. Blumrosen follows:]

Prepared Statement of Alfred W. Blumrosen, Professor of Law and Herbert J. Hannoch Scholar, Rutgers Law School, Newark, NJ

My name is Alfred W. Blumrosen. I am a Professor of Law at Rutgers Law School, Newark, New Jersey and have been a member of the Rutgers Law Faculty for thirty years. In 1965, as a result of my study of the New Jersey Division on Civil Rights [1] and my advice to Rutgers University in addressing discrimination in construction of university buildings, I was asked to assist in setting up the Equal Employment Opportunity Commission. I have been involved in the implementation of title VII of the Civil Rights Act of 1964 since that time as an administrator, consultant, law professor and counsel for plaintiffs and defendants, employers, unions, employees and civil rights organizations.

I listened to the witnesses at your hearing Tuesday, and I have reviewed their prepared statements. I appreciate the opportunity to comment on the situation which has come before you.

You were informed Tuesday by Chair Thomas, Commissioners Silberman and Webb, and Acting General Counsel Butler, that Mr. Butler did advise his regional attorneys not to submit any proposals which would include goals and timetables for his or the Commission's approval. Mr. Butler stated that he had not been directed to issue this advice, but had inferred that the Commissioners would no longer support goals and timetables, and chose to act on that inference. The inference was based on discussions with the Commissioners, and his participation in Commission meetings concerning litigation. The view of all of these witnesses was that there existed no Commission policy on the issue of goals and timetables [2] and, in that "vacuum" the Acting General Counsel was within his authority in adopting his position.[3] The other two Commissioners, Mr. Alvarez and Mr. Gallegos, considered that the goals and timetables issue has not been decided by the Commissioner.

This testimony exposed two fundamental errors on the goals and timetables issue.

First, and in my view, most important, it described a process of "government by inuendo;" where responsible officials skulk in the corridors of power, hoping that staff will intuit what they want them to do, rather than giving directions.

Secondly, it portrayed an erroneous picture of Commission policy. The Commission *has* a policy on goals and timetables which includes the use of goals and timetables in court decrees that result from litigation. That policy is expressed in the

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[1] Blumrosen, Anti Discrimination Laws in Action in New Jersey: a Law-Sociology Study, 19 Rutgers L. Rev. 187 (1965)

[2] Chair Thomas, Prepared Testimony, p. 6,7; Commissioner Silberman, Prepared Testimony. p. 5. (The Commissioner also suggests that the Affirmative Action Guidelines "track" the Weber decision. In fact, they preceded the Weber decision.)

[3] Chair Thomas, Prepared Testimony, p. 7, 10.

[4] Commissioner Gallegos, Prepared Testimony, p. 1; Commissioner Alvarez, Prepared Testimony, pp. 24-25.

Affirmative Action Guidelines which were adopted after notice and comment proceedings under the Administrative Procedure Act, and, in my view, have the "force of law."[5] This is "government by magic"—they simply cause a carefully worked out regulation with its supporting interpretations to disappear.

I would like to address these two issues separately.

I—THE EEOC POLICY ON GOALS AND TIMETABLES

When Eleanor Holmes Norton became Chair in 1977, the EEOC began to use Notice and Comment Rulemaking in adopting guidelines, including the Guidelines on Affirmative Action and the Uniform Guidelines on Employee Selection Procedures.[6]

Both of these documents remain in force today. They have not been revised, amended or repealed.

The Affirmative Action Guidelines specifically approve the use of Goals and Timetables and other forms of affirmative action to encourage voluntary compliance with Title VII. "Voluntary Compliance" of course includes concilation agreements entered into by the EEOC The EEOC Compliance Manual contains several illustrations of goals and timetables to be used in EEOC conciliation agreements.[7]

The introduction to the Guidelines states:

"It is the Commission's interpretation that appropriate voluntary affirmative action or affirmative action pursuant to an administrative or *Judicial* requirement does not constitute unlawful discrimination in violation of the Act. . . ." (emphasis added).[8]

At the time the Guidelines were issued as they note, the courts had already approved the use of goals and timetables.[9] Section 1608.8 of the Guidelines specifically protects employers who take affirmative action pursuant to court orders.[10] This section necessarily and properly supports the legitimacy of court ordered goals and timetables.

The Guidelines also state that goals and timetables may provide "opportunities for members of groups which have been excluded, regardless of whether the persons benefitted were themselves the victims of prior (discriminatory) practices."[11]

The Guidelines reject as "unfair" the decision of the Court of Appeals in *Weber.*[12] That decision limited the use of goals and timetables to situations where the program benefitted "prior victims" of discrimination. The Guidelines were issued before the *Weber* case was decided by the Supreme Court. Both the Commission and the Supreme Court, in Weber, by 5-2, rejected the exclusive focus on "prior victims of discrimination."

In light of this history of the position of the Commission in support of the use of goals and timetables, including their use in litigated cases, the Commission has disregarded its own history. And, finally, it is even suggested that the General Counsel has some independent statutory authority to take a position contrary to that of the Commission. This is incorrect. The General Counsel of the EEOC does not have the same statutory authority as the General Counsel of the NLRB, who has "final" authority to litigate, while the General Counsel of the Commission does not. Some thirty five years ago, the question of whether the General Counsel of the NLRB could override a Board Policy was decided adversely to the General Counsel.[13] The argument is simply wrong.

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[5] 29 CFR 1608.

[6] See Blumrosen, The Binding Effect of Affirmative Action Guidelines, 1 Labor Lawyer 261 (1985).

[7] See 611.13, 612.16, 612.17, 612.18 (Recruitment and hiring); 631.7, 632.10, 632.11 (Promotion); 662.17 (Union referrals).

[8] 44 Fed. Reg. 4422 (Jan. 19, 1979).

[9] Id. at 4425.

[10] 29 CFR 1608.8 provides:

"§ 1608.8 Adherence to court order."

"Parties are entitled to rely on orders of courts of competent jurisdiction. If adherence to an Order of a United States District Court or other court of competent jurisdiction, whether entered by consent or after contested litigation, in a case brought to enforce a Federal, state, or local equal employment opportunity law or regulation, is the basis of a complaint filed under Title VII or is alleged to be the jurisdiction for an action which is challenged under Title VII, the Commission will investigate to determine: (a) Whether such an Order exists and (b) whether adherence to the affirmative action plan which is part of the Order was the basis of the complaint or justification. If the Commission so finds, it will issue a determination of no reasonable cause. The Commission interprets Title VII to mean that actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII."

[11] 29 CFR 1608.4(c).

[12] 44 Fed. Reg. at 4425.

II—THE VIOLATION OF THE RIGHTS OF PUBLIC PARTICIPATION

As first Chief of Conciliation for EEOC, I negotiated the agreement with the News Shipyard in 1966. That agreement was the first demonstration under Title VII that the ending of discrimination required revision of many aspects of an industrial relations system, as well as individual relief. It developed an objective standard to determine if the reforms did assure the inclusion of minorities into the apprenticeship program.[14] This was the forerunner of the goals and timetables programs.[15] The agreement was criticized on the floor of the United States Senate in 1967. It was defended by Sen. Javits, Republican of New York, whose accomplishments on behalf of civil rights will be his finest memorial. Sen. Javitz placed in the Congressional Record a memorandum which I had prepared explaining the agreement.[16] This was part of a practice at EEOC, adhered to consistently from 1965 until this year, of functioning in public view; of being subject to public scrutiny in its actions, and of explaining and justifying its policies.

The difficulty and complexity of the task of eliminating employment discrimination and the fact that the position of the government on these matters affects all of us in different ways, makes this public performance of the Commission's duties both important and appropriate.

When the Commission began to make substantive policy decisions in 1965, it chose to issue guidelines to advise the public of its position on many matters, rather than decide issues only on a case by case basis which would provide little public understanding of its position. When the Commission's first guideline, on employment testing, reached the Supreme Court, it was opposed by the Chamber of Commerce on the grounds that the Commission members and staff had publicly stated that they sought a broad interpretation of the statute. The Court confirmed the Commission's approach to the testing issue.[17]

The Goals and Timetables program of the Labor Department was subject to debate in the Congress in 1972, when Title VII was amended. Once again, Senator Javits defended the administrative program in the Senate, and other Republicans, including Rep. Gerald Ford did likewise in the House. The Congress refused to restrict the programs.[18] The work of the government in the EEO field was thus kept constantly before the public, and was subject to public comment, scrutiny and criticism.

During the mid seventies, a series of investigations and reports on agency activities by the U.S. Civil Rights Commission further documented the workings of the agencies.[19] This Committee has kept a sharp eye on EEOC over the years.

As I noted earlier, the Affirmative Action Guidelines, which I helped to develop, were adopted after Notice and Public Comment. I believe they have the force of law and I have criticized the department of Justice for following a contrary policy.[20]

In the spring of 1984, at a meeting of the Labor and Employment Law Section of the American Bar Association in New Orleans, I asked Assistant Attorney General William Bradford Reynolds, how he could justify his anti affirmative action policies in the face of these Guidelines. According to my recollection and to the report published at the time in the Daily Labor Report, he agreed that these regulations had the "force of law," but concluded that the department of Justice was not bound by them. Mr. Reynolds, no great supporter of affirmative action, said it would be "unthinkable" for the EEOC or OFCCP to disregard their published regulations without going through the appropriate procedures for their modification.[21]

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[13] See In re Retail clerks and A-1 Photo Service, 83 NLRB 564 (1949) upheld, A-1 Photo Service v. NLRB, 187 F.2d 418 (9th Cir. 1951).

[14] Blumrosen, Black Employment and the Law, 328-394 (1971).

[15] The increasing specificity of standards to measure how employers carried out their equal opportunity obligations is described in Blumrosen, The Law Transmission System and the Southern Jurisprudence of Employment Discrimination, 6 Indus. Rel. L. Jour. 313 (1981).

[16] The exchange is reproduced in Black Employment and the Law, note 14 supra, at pp. 378-394.

[17] See Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59, 110 (1972).

[18] See Blumrosen, The Group Interest Concept, Employment Discrimination and Legislative Intent, 20 Harv. Jour. On Legislation 99, (1983).

[19] U.S. Civil Rights Commission, The Federal Civil Rights Enforcement Effort, reports in 1971, 1973, 1977.

[20] Blumrosen, note 6, supra. The criticism was first made public at the May 4, 1984 meeting of the Section on Labor and Employment Law, American Bar Association. See Daily Labor Report, May 8, 1984, D 1-7.

Well, the "unthinkable" has happened. The testimony before you Tuesday demonstrated that the EEOC has disregarded its own Goals and Timetables Policy without formal action of any kind.

Thus a disagreement over the proper role for affirmative action has been transmitted into another—and in some ways more fundamental problem—the integrity of the processes of government, and the right of the public to participate in the development of government regulations. I believe the behavior of the EEOC may be of concern to the Judiciary Committee as well as to this Committee.

Chair Thomas stated to you that "policy should not be developed in reaction to public furor" and that he wished in policy making to "stay above the maddening crowd." The "maddening crowd" is we the people. The "public furor" is the vigorous wholesome and frank debate that shapes and informs governmental action in a democracy. Chair Thomas position is essentially to disregard public concerns by taking action where the public can have no voice. This is administrative arrogance. It is contrary to the policies of the Administrative procedure and Sunshine Acts, which have moved toward public participation in policy making.

I believe that the EEOC has violated both the administrative Procedure Act[22] and the Government in the Sunshine Act.[23] It is a well settled rule of administrative Law that government agencies are bound by their own regulations until they are revised through proper procedures.[24] The Administrative Procedure Act requires that substantive regulations issued after notice and opportunity for public comment, be modified through the same process. The Supreme Court has so held in the "air bag" case.[25] The failure of EEOC to announce a proposed change in the Affirmative Action Guidelines and subject that proposal to public examination thus is a violation of the APA.

The only way the Commission could submit such a proposed change in its regulations to public comment would be to vote to publish a proposed revision of the Guidelines for comment.[26] Such action would clearly constitute "agency business" and would also constitute "joint conduct" of such business, within the meaning of the Sunshine Act.[27] Therefore, if the Commission held such a meeting, it would have to be a public meeting within the scope of the Sunshine Act.[28] It would have to be noticed so that the public could attend, and understand the position of the commissioners.[29] By avoiding holding any meeting on this business of the agency, the Commission has violated the spirit, if not the letter, of the Sunshine Act.

This analysis does not depend on the substantive view one takes of affirmative action. For the purposes of this analysis, I assume that the EEOC could, through proper procedures, change the content of the Affirmative Action guidelines, or even repeal them, if they can meet the standards set forth by the Supreme Court.[30]

All official actions in this direction, however, must be taken in the "sunshine." The preliminary steps in these deliberations may quite properly be done in private. Discussion by agency officials as they develop policies, with each other and with the groups which will be affected by proposed policies must be carried out on a confidential basis so that the freest form of exchange can take place. Only in this way will the government get the benefit of deep thoughts, rather than public posturing. I have participated in the development of a number of regulations over the last twenty years, and am convinced of the crucial importance of confidential communications within the government, and between governmental personnel and those affected by regulation.[31]

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[21] Id. at A-6.

[22] 5 USC 553.

[23] 5 USC 552(b).

[24] United States v. Nixon, 418 U.S. 683 (1974).

[25] Motor Vehicle Mfgr's Ass'n v. State Farm Mutual Automobile Ins. Co., 103 S.Ct.2865 (1983).

[26] The Commission consists of five members, one of who is designated by the President as Chair, and one as Vice Chair. Sec. 705 (a); 42 USC 2000e (4) (a). The Chair is responsible for administrative operations, "on behalf of" the Commission. Three members constitute a Quorum 705 (c); 42 USC 2000e (4) (c). The Commission is given various powers, "including enforcement powers" *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433 (1971) in Sec. 705 (g) and 706; 42 USC 2000e 4(g) and 5. Thus it is the Commission which can announce its policies concerning the interpretation of the statute, which may be entitled to deference. See *Griggs*, supra at 434. *Blumrosen*, supra note 10 at 262 n. 6 and 7 describes the guidelines issued by The Commission between 1965 and 1980. All Guidelines were issued by vote of the Commission.

[27] See Berg and Glitzman, "An Interpretive Guide to the Government in the Sunshine Act," 3-11 (1978).

[28] 5 USC 552 (b) (b).

[29] Id. at (e).

[30] *Motor Vehicle Mfgr's Assn*, supra note 17; *Chevron, U.S.A. Inc.* v. *Natural Resources Defense Council*, 104 S.Ct. 2778 (1984);*Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 519 (1978); *Baltimore Gas and Electric Co.*, v. *Natural Resources Defense Council*, 103 S.Ct. 2246 (1983).

Such confidential activities are consistent with our concern for civilized government only because the ultimate result of those deliberations—the decision—and the reasoning in support of that result is open for public scrutiny and ultimately judicial review. Private discussions will yield more sensitive and tailored public policies, and therefore better government. But this reasoning is subverted if the ultimate decisions are kept secret. Just as our legislators must ultimately cast their votes in public, our administrators must make their views and positions known through proper procedures. Without that assurance, the underlying faith in the basic integrity of governmental processes is eroded; and without that faith, the Republic is in jeopardy. In a simpler time, we used a slogan that we were a "government of laws, not of men," to suggest that we did not allow those who happened to fill seats of government exercise unfettered discretion. We hedged their discretion with both substantive and procedural standards.

The point is still valid. Our world is more complex and government is more complicated. But secret government is anathema to a democractic society. If the commissioners wish to change the EEOC policy, perhaps they can do so. But not through the process which was described to you on Tuesday. Thank you.

CHALLENGING CHANGES IN FEDERAL EEOC POLICIES

[Daily Labor Report, May 8, 1984, p. A-6]

JUSTICE DEPARTMENT'S DISREGARD FOR EEOC REGULATIONS IS ILLEGAL, LAW PROF ARGUES

The Justice Department's argument that affirmative action programs violate Title VII of the 1964 Civil Rights Act and the Constitution disregards and contradicts regulations endorsing such plans issued by two other Federal Government agencies—EEOC and the Labor Department's Office of Federal Contract Compliance Programs, a law professor and former consultant at the Commission contends.

But Assistant Attorney General William Bradford Reynolds, chief architect of the Reagan Administration's anti-quota position, responds that Justice "is not bound" by the regulations issued by the other agencies. Acknowledging the conflicts that continue to exist between EEOC and Justice, however, he adds that "it would make a lot of sense" for the Federal Government "to get its act together across the board."

In a May 3 address to the Labor Law Section of the American Bar Association at its spring meeting in New Orleans, Alfred Blumrosen, professor at Rutgers University School of Law and formerly a consultant at EEOC, charged that "the cavalier manner" in which Justice has disregarded Commission regulations violates provisions of the Administrative Procedure Act.

Both the Commission and OFCCP are executive agencies and it is "inappropriate for the legal arm of the executive branch" to try to change regulations that have been legally adopted by those agencies, Blumrosen said. Neither Labor nor EEOC could change their own regulations without a period of formal comment, he observed, and the Department of Justice "simply cannot be immune from the 'force of law' generated by these guidelines."

The authority of the Justice Department to litigate for the United States "does not encompass the power to disregard the decisions of other agencies," and the Administrative Procedure Act "precludes the Department of Justice from undermining or challenging as unconstitutional legislative or substantive regulations issued by executive agencies, without those agencies first modifying the supposed unconstitutional features through appropriate procedures."

The "undermining" of the rules by DOJ "is not sensible government," he added.

If Justice continues to disregard regulations issued by other agencies, a "prime loser" will be the business community, "which must plan its affairs in expectation that government will behave in a coherent manner." If the Administration chooses to rescind the regulations, he concluded, "it should seek to require the appropriate agency to do so in accordance with the APA," rather than seeking court review by Justice of those regulations.

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[31] Blumrosen, "The Bottom Line in Equal Employment Guidelines: Administering a Polycentric Problem," 33 Ad. L. Rev. 323 (1981).

Questioned by Blumrosen later in the meeting, Assistant Attorney General Reynolds said that although it would be "unthinkable" for either OFCCP or EEOC to proceed against their own regulations in court or administratively without formally changing them, DOJ "is not bound" by those regulations.

Acknowledging the differing points of view that have existed in the Administration's policy toward affirmative action—differences that came to head last year when EEOC attempted to file a conflicting brief in the affirmative action case involving the New Orleans Police Department—Reynolds added that "it would make a lot of sense" for the Federal Government "to get its act together across the board."

The regulations of both agencies require "rethinking," Reynolds asserted, and that process "is going a lot slower than we would have liked."

(Blumrosen's remarks appear in Text Section D.)

Mr. MARTINEZ. Now, we'll turn to Mr. Robinson.

STATEMENT OF WILLIAM ROBINSON, EXECUTIVE DIRECTOR, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Mr. ROBINSON. Mr. Chairman, members of the subcommittee, I want to first thank you for the opportunity to appear before you once again to talk about the Equal Employment Opportunity Commission, in this instance, specifically about its policies or rather its lack of policies concerning the use of goals and timetables and other numerical measures as part of remedies for violations of title VII of the 1964 Civil Rights Act.

This morning, I want to speak briefly to two things: first, the abdication of responsibility by the Commission; and, second, the improper actions by the acting general counsel.

The specific things that bring us here this morning are indeed several recent actions by the acting general counsel, particularly his instruction to regional attorneys that they should not submit any more consent decrees that contain goals and timetables.

The acting general counsel apparently issued this instruction, not based on any formal, official change or adoption of commission policy nor a vote on commission policy. Rather he based his action on an inference as to the Commission policy, he drew this inference from comments made by the Commission, by commissioners, while they voted not on remedies, but on whether or not to authorize suit. Apparently they made comments negative to the use of goals and timetables as remedies with such force and frequency as they voted on whether or not to authorize litigation that the acting general counsel concluded that there had indeed been an adoption of policy as a practical matter, I call it *de facto* policy, against the use of goals and timetables as part of remedies under title VII, and instructed the regional attorneys accordingly.

This method of proceeding by the Commission is an abdication of their responsibility to adopt policy in a proper fashion, a proper fashion. It has the effect of depriving their constituents of policy making by the Commission which is fair in its process and is clearly stated as a matter of principle.

As to process, I think it's debatable whether or not the Commission must file notice, comment, whether they can adopt a policy as part of an open meeting or as part of published notices and so forth. The point is whether we're talking about formal rulemaking or the adoption of guidelines or the publication of interpretive bulletins or any other form of policy making that a commission can undertake, it must be basically fair. Fundamental fairness, I would suggest, requires that there be some opportunity for knowledgeable people to comment and provide advice to the agency.

In terms of its statement of principle, by that I really mean no more than that it be in writing, and clearly state what it purports to achieve. There are some other things, however.

If the Commission had not abdicated its responsibility to adopt policy in a proper manner, there are several things it would have had to consider. First, it would have have to consider the question of whether goals and timetables are indeed lawful. I suggest to you that the answer to that question is clear. I need not rehash all the decisions, because they are carefully and properly, correctly reivewed in Commissioner Alvarez' testimony and, of course, in testimony that we have previously submitted to this body.

I would make only a couple of additional points. First, Chairman Thomas and Commissioner Webb cannot properly hide behind the Supreme Court's decision in *Stotts*. Seven Circuit Courts of Appeal have ruled since the *Stotts* decision. Taken together, that constitutes a national answer. The Equal Employment Opportunity Commission is bound by the law, as stated by the Circuit Courts of Appeals. They've got their answer, and in considering the legality of it, they must follow the Courts of Appeals' decisions.

Chairman Thomas suggests that he wants to wait until the court renders a decision in the three pending affirmative action cases. No, that's not right. The law is clear now. He should follow the law now. After all, we must keep in mind the Supreme Court has agreed to review these very issues, on several times in the past without rendering a definitive decision, and there is every possibility that that will happen again.

The next thing the Commission would have to consider is whether or not affirmative action, use of goals and timetables is an effective remedy. Commissioner Silberman suggested she didn't think it was an effective remedy, but she didn't cite anything for that. Responsible policy consideration and development includes study. There have been a number of recent studies. We've cited them to you before. I won't reiterate their holdings now, but they all conclude that goals and timetables are effective relief under this act.

Next, you would have to consider whether or not goals and timetables are sometimes necessary. Here again, it cannot be gainsaid that on certain occasions the use of goals and timetables is absolutely necessary. I give in my testimony, and I won't detail it now the example of using goals and timetables to provide relief in important public safety jobs where a test has been held invalid, and there's the need to undertake immediate hiring. Clearly, goals and timetables are necessary.

Even where not necessary, absolutely necessary, goals and timetables are thoroughly appropriate in still other circumstances. For example, where you've got a long history of discrimination and the goals and timetables are necessary as a goal to a recalcitrant employer and so forth. In short, if the Commission, instead of abdicating its responsibility properly considered the proper questions, I believe they would have been compelled to a decision that goals and timetables are appropriate policy and appropriate relief under the act.

Let me turn my attention now briefly to the acting general counsel, because he made several mistakes. First, let me say Johnny Butler is a good friend of mine. I've known him a long time. I respect Johnny very much as a competent and forceful lawyer, a man who is dedicated to enforcing title VII. Just because he's my friend, I can't give him a free ride.

Johnny first exceeded his statutory authority as acting general counsel. To be sure, he's got broad authority to supervise the conduct of litigation. Here, in the instruction to the regional attorneys goes beyond merely supervising litigation and invades the policy making prerogatives that belong to the Commission. Moreover, the kind of instruction he gave here is supervision of the regional attorney of a kind which I believe section 705(b)(1) requires that he do in cooperation with the chairman, and section 705(b)(1) requiring that cooperation with the chairman, I believe, was inserted into the statute precisely to avoid the kind of problems that we're confronting here.

Second, the acting general counsel abused his prosecutorial discretion. This was not an action of prosecutorial discretion of a kind that involves analyzing the pros or cons of relief in a particular case and making a judgment based on the law and the fact. Rather, it was a sweeping directive that attorneys should not submit consent decrees containing goals and timetables under any circumstances, that relief being fully authorized by every Court of Appeals in the company. The rejection of it is an abuse of his prosecutorial discretion.

Finally, if you'll recall, Johnny indicated a number of times during the course of his testimony that as a lawyer he is obligated to represent his clients pursuant to their wishes. To be sure, that is correct, but counsel also has an obligation to advise their clients. There is no indication here that the acting general counsel advised his clients as to the law. The law is clear. Goals and timetables are permissible relief. The clients should have been informed of that in writing, and been called upon to vote before contrary policy was pursued.

In conclusion, I'd like to again thank you for the opportunity to appear before you. It's important that you hold these hearings. They are a very effective way of calling the agency to task for its derelictions. I know that when I spoke last Friday to several members of the agency Friday night at 6:30, they were working on preparation of law suits. They were doing that, in part, because you were going to be having oversight hearings on Tuesday.

I urge that you prepare an appropriate report of these hearings, because in my experience holding a public figure or a non-public figure up to oblique, denunciation and rebuke for their transgressions is an appropriate and effective way of curing those transgeressions. Thank you, Mr. Chairman.

Mr. **Martinez**. Thank you, Mr. Robinson.

[The prepared statement of William L. Robinson follows:]

PREPARED STATEMENT OF WILLIAM L. ROBINSON, DIRECTOR, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

I. INTRODUCTION

Mr. Chairman and Members of the Subcommittee: Thank you for the opportunity to testify before you concerning the Equal Employment Opportunity Commission's policies regarding the use of goals, timetables or other statistical measures as elements of an appropriate remedy for violations of Title VII of the 1964 Civil Rights Act. It is particularly appropriate that you hold these hearings in order to provide oversight and guidance concerning several recent developments within the agency which I will discuss today.

First, I understand that the Acting General Counsel, Johnny Butler, has instructed the agency's Regional Attorneys that they should not submit to the national office for approval any proposed settlements which include goals and timetables. This instruction is not based on a general policy determination by the Commission. Indeed, it conflicts with the policy set forth in the Commission's affirmative action guidelines, 29 C.F.R. Section 1608.4c(1). Rather, the Acting General Counsel arrived at his decision to eschew goals and timetables in the settlement of cases based on intuition -- he inferred what Commission policy was from the individual commissioners' votes to authorize or reject the filing of specific law suits. In written and oral testimony presented to this Subcommittee on March 11, 1986, both Acting General Counsel Johnny Butler and various members of the Commission confirmed this.

Second, the Equal Employment Opportunity Commission recently signed a consent decree which included a paragraph containing a provision which states that the Equal Employment Opportunity Commission takes no position on a clause in the decree providing for hiring goals, and will not participate in enforcement of that clause.

Third, the Acting General Counsel has reportedly taken the position that until the Supreme Court resolves several pending affirmative action cases, "the EEOC is not seeking court enforcement of provisions of conciliatory agreements or consent decrees that involve numerical goals and timetables." "Three Supreme

Court Decisions Are Expected To Resolve Lingering Bias Issues," The Chronicle Of Higher Education (Jan. 29, 1986) at page 15.

The Commission's failure to consider and adopt appropriate guidelines or to issue proper management directives relating to implementation of present Commission policy constitutes an abdication of its responsibility to provide policy guidance in the interpretation of Title VII for its own employees, for employers and unions, and for the victims of discrimination. Indeed, the Commission's abdication of its responsibility contributed to the Acting General Counsel's felt need to infer policy from his discussions with individual Commissioners and from their votes on other matters, and to instruct the Regional Attorneys in accordance with his interpretation. However, in so instructing the regional attorneys, the Acting General Counsel exceeded his statutory authority, abused his prosecutorial discretion and failed properly to advise his client, the Commission.

II. THE COMMISSION HAS ABDICATED ITS POLICY MAKING RESPONSIBILITIES

It is axiomatic that the EEOC has the primary responsibility for administering, interpreting and enforcing Title VII. For this reason, the Supreme Court of the United States has deferred to the Commission's interpretation of difficult and novel questions arising under Title VII of the 1964 Civil Rights Act. Griggs v. Duke Power Company, 401 U.S. 424, 433-34 (1971). Consistent with this responsibility, the Commission has issued numerous guidelines or manuals providing guidance on controversial or difficult questions arising under the Act. See 29 C.F.R. Part 1604 et. seq. and EEOC Compliance Manual (reprinted by the Bureau of National Affairs). Indeed members of the Commission have proudly called this Subcommittee's attention to their recently adopted Statement of Remedies And Relief For Individual Cases Of Unlawful Discrimination. (See March 11 testimony of Chairman Thomas, at page 4; Commissioner Alvarez, at page 1.) However, despite the controversy concerning the permissibility of using goals and timetables or other numerical measures as remedies for unlawful discrimination under Title VII, the Commission has failed to adopt or even to consider, in a responsible manner, the adoption of appropriate policies concerning the use of such remedies under the Act. Chairman Thomas testfied:

> This Commission has not adopted any policy concerning the use of goals and timetables as remedies for discrimination in cases under Section 706 and 707 under Title VII. (Chairman Thomas, at page 6)

Similarly, Commissioner Alvarez testified:

> As regards remedial relief in pattern and practice cases, the Commisicn does not have any proposed Guidelines which address appropriate forms of relief in general or the availability of goals and timetables in particular. (Commissioner Alvarez, at page 19)

On the other hand, individual Commissioners, particularly Chairman Thomas, have previously stated their opposition to the use of goals and timetables. Indeed, Chairman Thomas testified that he had "vehemently" discussed his views with the Acting General Counsel, Mr. Butler. (See transcript of Mr. Thomas' testimony at page ____.) In addition, over the past several months, various members of the Commission have expressed their views about the use of goals and timetables as a proper remedy during discussions at Commission meetings of whether the agency's lawyers should be authorized to initiate suits in particular cases. The statements apparently occurred with sufficient force and frequency to yield the inference that a majority of the Commission would routinely, and as a matter of policy, disapprove the use of goals and timetables or other numerical measures as legally appropriate remedies for violations of Title VII. Thus, Mr. Butler, while denied the benefit of a formal policy decision by the body responsible for making such decisions, was faced with the practical reality of a _de facto_ decision. Apparently, he felt obligated to instruct the Regional Attorneys to comply with the _de facto_ decision.

The Commission's _de facto_ decision to reject the use of goals and timetables and other numerical measures of relief is irresponsible and constitutes an abdication of its statutory responsibilities. It also deprives its constituency -- individuals with claims of discrimination -- of the benefit of a decision fairly reached as a matter of process and clearly stated as a matter of principle. If the Commission had not avoided its responsibility it would have to consider whether goals and timetables are: (1) legally permissible, (2) effective, (3) necessary in some cases, and (4) appropriate in other caes (and the circumstances under which they are appropriate). Proper consideration of these factors would compel a decision that goals and timetables are lawful, effective, sometimes necessary and in many other instances totally appropriate.

The Legality of Goals and Timetables

The Lawyers' Committee has previously testified before this Committee concerning the legality of goals and timetables. (See our testimony on July 18, 1985). It is unnecessary to reiterate our previous analysis demonstrating the legality of goals and timetables because Commissioner Alvarez has correctly restated much of that analysis in his testimony (Alvarez testimony, at pages 6-18). I merely wish to emphasize here that Chairman Thomas's, Mr. Webb's and Mrs. Silberman's reliance on the *Stotts* decision underscores the irresponsibility of their conduct. The Courts of Appeals for seven Circuits have interpreted the *Stotts* case contrary to the views which they expressed. The Commission is bound by the decisions of these Courts of Appeals. It should adopt policies consistent with these decisions.

The Supreme Court is presently considering three cases involving the use of goals, and timetables, and other numerical measures. *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland an[illegible]nguards of Cleveland*, *cert. granted*, 54 U.S.L.W. 3223 (U.S. October 8, 1985) (No. 84-1999), *Local 638 . . . , Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC*, *cert. granted*, 54 U.S.L.W. 3223 (U.S. October 8, 1985), and *Wygant v. Jackson Board of Education*, *cert. granted*, 53 U.S.L.W. 3739 (U.S. April 15, 1985) (No. 84-1340). Chairman Thomas has promised to implement any decision upholding the lawfulness of goals and timetables. This is commendable; however, he and the Commission should already have implemented policies consistent with the decisions announced by the Courts of Appeals.

The Effectiveness of Affirmative Action

Some Commissioners testified that goals and timetables are an ineffective remedy. They are simply wrong. All the recent studies confirm the effectiveness of goals and timetables under Executive Order 11246. These studies are summarized in our previous testimony before this Committee. There is no reason to believe that goals and timetables are less effective when adopted in settlements with EEOC as opposed to settlements with OFCCP.

Necessity for Affirmative Action

Similarly, we have previously testified as to the necessity of affirmative action in appropriate cases. I refer the Committee to our prior testimony. I offer only one additional illustration this morning. Where a city has relied on an invalid test which excludes a disproportionate number of minorities from its police or fire-fighting departments, it will generally be declared to have violated Title VII. Because it is impossible quickly to develop and validate a test while there is a need promptly to hire additional police officers or firefighters, it is often impossible to identify and hire the actual victims of discrimination who are entitled to make-whole relief. Goals and timetables are thus necessary to provide a remedy which allows the city promptly to hire personnel needed for their public safety positions.

Appropriateness of Goals and Timetables

Even where not absolutely necessary, goals and timetables are often appropriate to provide a goad to recalcitrant employers or a useful monitoring device for other employers, especially those which have a long history of excluding protected classes through discriminatory policies which cannot be precisely identified because, for example, they were manifested in the subjective decisions of lower-level managers. On the other hand, there are cases where goals and timetables would not be appropriate; for example, where the specific victims can be identified or the discriminatory practices can be corrected with assurance that there will be prompt compliance.

III. THE ACTING GENERAL COUNSEL EXCEEDED HIS STATUTORY AUTHORITY, ABUSED HIS PROSECUTORIAL DISCRETION AND FAILED PROPERLY TO ADVISE HIS CLIENT

A. The Acting General Counsel Exceeded His Statutory Authority

Section 705(b)(1) gives the General Counsel of the Commission responsibility for the conduct of litigation under Section 706 and 707. This Section also provides that the General Counsel "shall confer with the Chairman on . . . supervision of Regional Attorneys." Mr. Butler and members of the Commission have suggested that he has the authority to issue instructions to the Regional Attorneys as part of his responsibility for the conduct of litigation. Undoubtedly, the General Counsel has broad authority to guide attorneys in the prosecution or settlement of particular cases. However, Mr. Butler's instructions crossed the boundary line of merely conducting litigation and invaded the policy responsibilities reserved to the Commission. It was specifically to avoid this circumstance that Congress requires the General Counsel to confer with the Chairman concerning appropriate supervision of Regional Attorneys. Chairman Thomas flatly denied that he conferred or instructed Mr. Butler concerning his policy directive to the Regional Attorneys.

B. The Acting General Counsel Abused His Prosecutorial Discretion

In his oral testimony, Mr. Butler indicated that goals and timetables are legally permissible remedies, appropriate in at least some cases. He suggested, however, that some settlements reflected an undue reliance on goals and timetables and an unacceptably poor affected-class analysis or analysis of relief available to specific victims. One cannot quarrel with this much of Mr. Butler's analysis. Nor could one quarrel with his exercise of prosecutorial discretion to reject the use of goals and timetables in a particular case, based on an analysis of the law and facts pertaining to that case. However, one must reject Mr. Butler's decision to throw out the baby with the bath water by directing the Regional Attorneys never to submit consent decrees containing goals and timetables, under any circumstances. His decision does not reflect the careful exercise of prosecutorial discretion. Rather, it is an improper refusal to accept relief authorized by the courts.

C. The Acting General Counsel Failed to Advise His Client

Mr. Butler instructed the Regional Attorneys not to submit settlements containing goals and timetables based on his interpretation of his client's desires. Ordinarily, it is to be expected that a lawyer will not "infer" his clients' desires. A lawyer should ask for clear guidance from the client. More importantly, a lawyer has the obligation to inform the client of his understanding of the law and not simply champion his client's wishes. A lawyer should first inform the client of the law and seek to pursuade the client voluntarily to comply. Indeed, the Congress relied heavily upon this principle in adopting the requirement for voluntary concilation in Title VII. There is no indication from the testimony before this Subcommittee that Mr. Butler informed his clients that goals and timetables are a legally permissible form of relief. Thus, he failed to provide his client with proper advice and counsel.

* * *

I have discussed in some detail the deficiencies in the Commission's performance of its enforcement responsibilities arising from the Acting General Counsel's instructions to the field to abandon the use of goals and timetables in negotiating settlements in pending cases. I have suggested that there was a violation of appropriate procedure as well as an unjustified departure from established legal principles accepted by eleven United States Courts of Appeals. The same defects are evident in the two other examples of recent Commission activity which I mentioned at the outset, so I will just summarize them.

In one instance, Commission attorneys have formalized its unannounced and un-voted, "inferred," policy against goals and timetables by adding langauge to a consent decree which included hiring goals declaring that the agency will not enforce that part of the decree.

The Acting General Counsel has also reportedly suspended any judicial enforcement of previously negotiated decrees involving affirmative or numerical relief -- even in those federal Circuits where such relief has been endorsed by the Courts of Appeals -- until the Supreme Court decides the three cases pending before it. This action conflicts with Chairman Thomas's written testimony, in which he assured the Subcommittee that the EEOC would continue to enforce prior settlements. Such a move also breaks faith with the thousands of victims of discrimination who have relied on the Commission's negotiated settlements to protect their rights to equal employment opportunities.

IV. CONCLUSION

In conclusion, I again thank the Subcommittee for this opportunity to speak with you concerning the failure of leadership at the EEOC. I urge the Subcommittee to continue to exercise your oversight and guidance over the agency and to encourage the Commissioners to cease and desist from their irresponsible conduct. I ask that you take all proper steps to pursuade the Commissioners to adopt forward-looking policies which will fully vindicate the purposes of the Act, including the use of goals and timetables in appropriate cases.

Mr. MARTINEZ. We'll turn to Ms. Vladeck.

STATEMENT OF JUDITH VLADECK, ESQ., VLADECK, WALDMAN, ELIAS & ENGELHARD, PLAINTIFF'S ATTORNEY, MAC MILLAN CASE

Ms. VLADECK. Mr. Chairman, members of the subcommittee, I am an attorney who has engaged in the private practice of law in New York City for more than 35 years, the last 15 of which have been devoted to representing plaintiffs in sex and race discrimination class actions. I believe my distinction today is twofold, one that I am an advocate in the trenches representing plaintiffs in the kinds of cases in which goals and timetables are relevant. I think my other distinction is the dubious one of having been class counsel in the recently settled case of *Meyer* v. *Mac Millan*, in which, and I believe it was the first one, in which the acting general counsel refused to participate in a settlement, because the settlement which had been worked out over a period of more than a year contained a provision for goals and timetables. That was the *Meyer* v. *Mac Millan* case.

I suggest that a review of the facts of that case will make clear how inappropriate it is for EEOC even to consider abandoning what is an essential and appropriate remedy in cases of this kind. In the *Mac Millan* case, women had since 1974 attempted to end what they claimed to have been discrimination which barred them from certain job titles, job groups, and certain opportunities within the company.

They had gone through the Department of Labor processes, they had gone through the State division of human rights processes. EEOC in 1978, when the law suit began, intervened. It had found probable cause to believe that there was discrimination against women by that employer.

After years of discovery and after analysis of numbers by expert witnesses, the parties began to talk about the possibility of settling this decade long fight. EEOC's counsel participated along with me in trying to fashion a settlement with the employer. The first item in my proposed settlement was not money. It was goals and timetables.

As a practitioner for all of these years, I know that that is at the heart of any settlement or of any court decree, and it was goals and timetables that was in the first item of the agenda for our discussion before money. It took a year for the parties to work out a settlement, but we agreed on goals. The employer did not disagree. It understood that at the end of this long period of litigation. It too wanted the assurance that what it was doing in the future could be accurately measured. It wanted an end to this long war. We have no problem with the employer and plaintiffs in working out goals and timetables. We agreed on how they should be derived. We agreed equally to language that made it clear that these were not inflexible minima or maxima, nor were they quotas of any kind, that what they were intended to do, and I'm reading from the consent decree, was to provide a way to judge whether the defendant exercised good faith in achieving the established goals which were intended to insure that female employees were not restricted or segregated to particular divisions, branches, departments, job titles, or grade levels.

We were quite proud of the document that we finally worked out in December. We signed off on it. The regional office of EEOC signed off on it. It came to the attention of the acting general counsel in Washington who sent it back and said EEOC will not participate in this decree.

There was then some discussion as to whether they would agree to a settlement of all of the other terms, if a separate document were prepared omitting reference to those.

The defendant very properly in my opinion refused to have two settlements where it could be whipsawed. Ultimately the impasse was overcome by a statement that the EEOC takes no position with regard to, is not a signatory to, and will not participate in the enforcement of this section, that is the goal section. The EEOC also agreed not to challenge, collaterally attack or otherwise oppose defendant's rights and obligations to maintain or implement the goals described herein.

If there were no private counsel in this case, that is if EEOC had itself been representing the class in this case, its investment of 7 years in this litigation would have been totally forfeited by that act. The distribution of small amounts of back pay to the great numbers of women in this class is a meaningless sum. What was achieved by the efforts of these women over the long years was to get into their settlement agreement, goals which could provide some way of assuring that this time the employer means it, that this time the injunctive relief that the agreement contains will have some way of being measured.

In my opinion, the conduct of the EEOC in repudiating the goals was irresponsible. My experience has been that class actions are the most effective device now available for ending or at least making a dent in the exclusionary practices of employers, that individual cases are not the way to go, pitting fragile individuals against the resources of huge employers.

The benefit of a class action is in exposing policies and practices which have the effect of denial of equal opportunity, but back pay awards have very limited utility. They're never likely to represent more than a token payment. The heart of a consent decree or a court decree concluding a class action is the injunctive provision saying to the employer, you must stop doing what you're doing.

Finally, I think we have to understand that injunctive provisions are not self executing any more than the statute itself is self executing unless we have a simply device to measure progress. We're going to do it again and again and again. We will litigate again and again and again, and we will move forward by such small measure that our efforts will have been wasted, and the law will mean nothing.

Mr. **Martinez**. Thank you.

[The prepared statement of Judith P. Vladeck follows:]

PREPARED STATEMENT OF JUDITH P. VLADECK

I am an attorney who has engaged in the private practice of law in New York City for more than 35 years. I have represented plaintiffs in sex and race discrimination class actions in the New York metropolitan area for the past 15 years. I have represented women faculty at The City University of New York, at The State University of New York, and at New York Polytechnic Institute. I have represented women bankers at The Chase Manhattan Bank, and Black bankers at Chemical Bank. I have represented Black managerial employees employed by Revlon. I have represented thousands of blue-collar workers employed by Western Electric. I was class counsel in the recently settled class action, Meyer v. MacMillan. I have also represented many individuals, men and women, claiming discrimination in employment.

What I have learned in my experience is that women and Blacks, where discrimination exists, are excluded from higher-paying, more prestigious positions, from training programs or assignments that would permit them to rise through the ranks. I have seen companies where whole areas are White-only or White-male only. I have seen employment practices that bring women or Blacks into entry level positions that are classified at a lower level than the same entry level jobs into which White males are hired.

On the basis of my experience, I have reached certain conclusions:

1. that class actions are the most effective device now available for ending, or at least making a dent in, the exclusionary practices of employers;

2. that individual cases are not the way to go if we are serious about ending discrimination; to pit one fragile human being against the unlimited resources of most employers is to create a cruel martyrdom with little hope either of helping the individual or forcing a change in the discriminatory practices or policies;

3. that the primary benefit of a class action is in exposing practices or policies which have the effect of denying equal opportunity to women or Blacks;

4. that back pay awards have only limited utility: companies that pay out a lot of money may learn to be cautious, and managers who have permitted large liability awards are not likely to be treated with favor by the employer;

5. that back pay awards are never likely to represent more than token payment for injuries suffered; the heart of a Court Order or a Consent Decree concluding a class action is the injunctive provision saying to the employer, "you must

stop doing what you are doing";

6. that in an ideal society, an injunction directing an employer, or by which an employer agrees, to obey the law, should never be necessary; if it were, we would need no judgments or Consent Decrees; and

7. that injunctive provisions are not self-executing, any more than the statute itself is self-executing.

In order for assurance that there will be compliance with the law, or with the injunction directing compliance with the law, we need some way to know whether there are changes, whether the policies or practices which excluded women or Blacks in the first place are, in fact, being altered. We cannot rely on goodwill; if we could, we would not have had to bring the class action to begin with. Certainly, we do not wish to litigate again and again and again. What we need is to know that all of our efforts have resulted in something more than declarations of intent. Goals permit us to know, the company to know, the plaintiffs to know, and the courts to know, whether the injunctive provisions are adequate to provide the relief that has been ordered or agreed to. Without numbers, or some simple measure, our choice is to litigate again and again or to engage in continuing discovery after the conclusion of a case, neither of which alternative makes any sense. Such a burden on plaintiffs, defendants and the courts would be intolerable.

In my opinion, people who claim that goals are quotas have had no experience of either. As a woman and a member of a religious minority, my early life was affected by quotas. I know what exclusion means. When I bargain on behalf of classes of women and Blacks today, I bargain for assurance that the unwritten quotas barring them from job opportunities do not continue to control their lives. To end the quota system which, whether numerical or not, has excluded women and Blacks, I need to know. I need to know whether the women bankers who were channeled into retail banking are now being permitted access to the higher paying, better positions in international or corporate banking. I need to know whether Black bankers are being permitted to enter the credit training programs. I need to know whether women instructors are being permitted to rise out of the adjunct or "instructor" title into the professorial ranks. I need to know whether women, with their brave, fresh Ph.Ds., are going to have access to jobs in the Economics or Chemistry Departments. If I can agree with an employer that women or Blacks should, absent artificial barriers, be in places where they are not, I need to know whether the employer is doing anything about getting them there, or not. If I cannot tell six months later, or a year later, or two years later, if the areas are no longer White-male only, I must know if the employer has changed its practices.

I must have a measure of its good faith - either through numbers or explanations. Otherwise, I have gotten for the plaintiffs nothing, and will have to agree that the law is nothing more than an empty promise.

Mr. MARTINEZ. Mr. Hiestand.

STATEMENT OF GREGORY K. HIESTAND, ESQ., EPSTEIN, BECKER, BORSODY & GREEN, P.C.

Mr. HIESTAND. Mr. Chairman, members of the committee, ladies and gentlemen. I am very pleased to appear before you today to provide what insight I may with respect to the recent conduct of the EEOC with respect to goals and timetables in the context of relief and resolution of title VII litigation.

You just heard from my able advocate in the *Mac Millan* case, Ms. Vladeck, with whom I strenuously disagree on many issues, both during the litigation and during the settlement discussions. As she correctly points out, however, one area where there was no disagreement was concerning the issue of goals and timetables.

Now, I'm one of the people who believes that there's a difference between a goal and a quota. As proponents and draftsmen of the language in the consent decree, I'm glad that Ms. Vladeck reads it as I do, as not imposing barriers, restrictions on anyone, but rather providing mechanisms by which the parties may avoid unnecessary disputes concerning the extent to which the operative provisions and the injunctive provisions of the decree have been complied with by the defendant.

It is important to remember the interest of an employer in litigation. Certainly one of the major roles the EEOC plays is an enforcement agency. Its obligations, however, are not limited to merely being an advocate for a particular point of view. As is true of all law enforcement agencies, it has an obligation to uphold the law even where advocates may appear before it or request it to go further than the law would permit.

Moreover, the EEOC has a variety of ancillary functions which are quite important. They include education, cooperation and general advancement of the interests of racial harmony, harmony between the genders and other protected individuals so that our society may ultimately become the kind of color, race, and other prohibited classification blind society I think we all would like it to be.

Those in the private sector who are charged with the duty of complying with title VII, managers of corporations which my firm and others like it represent are entitled to certain conduct in the formulation of policy by the administrative agency that is obliged and charged with enforcement of title VII. Specifically, I believe that management is entitled, just as the members of the plaintiff are entitled, to publicly formulated policy which is clear, consistently applied and in conformity with applicable law.

With respect to the now evidenced de facto policy of the EEOC, disfavoring the use of goals in the context of resolution of title VII litigation, we have instead had an example of policy clandestinely established which is at the same time confusing and unduly confrontational.

To me, this is both surprising and sad. While I have certainly had mixed reactions with respect to the conduct of the EEOC under this Administration, in general, in my opinion, the Agency has been quite careful to publicly formulate and convey most of the changes in policy, while management may be, as plaintiffs have been, concerned with some of the Agency's views. There has been in my view a noticeable improvement in the willingness of the agency to go public in both its litigation strategy and its policies concerning substantive title VII law.

For whatever reasons, this is not true with respect to goals. I said that the EEOC's current position is confusing. I think this is obvious not only from the comments that you've heard today, but in view of the EEOC's own guidelines. Clearly, the EEOC guidelines on affirmative action are binding on the EEOC as procedural regulations.

They reflect in my view binding precedent on the agency itself with respect to is policy concerning affirmative action by employers, and including there within the use of goals and timetables. Now, that policy is not necessarily binding on employers in view of the fact that the law obviously governs, and there have been certainly many examples where EEOC pronouncements, guidelines and other policy statements have been overruled by the courts both on procedural and substantive matters.

The concern for employers, however, has to do with the extent to which the agency clearly formulates its policy in a public manner so that when there are disputes, employers have notice, employers have the ability to make intelligent decisions and, where necessary or appropriate, to challenge agency action on the grounds that it violates the law or is otherwise inconsistent with national policy.

Under the current circumstances, especially in the context of the negotiations of the *Mac Millan* consent decree which Ms. Vladeck talked about, we did not have that opportunity. The agency announced to us, and there may be certain restraints on my ability to discuss the details in the settlement discussion, but I think it's fair for me to say that the agency announced that it would not participate a provision concerning goals and timetables. Initially, it was their request that there be a separate agreement. We rejected this as absolutely unacceptable. Instead, I requested language be proposed, and it was proposed. I believed it did not go far enough, and therefore, we insisted on the addition of language which would prohibit the EEOC from coming back and challenging what was agreed to in a consent decree except to the extent that the decree itself may violate Federal law.

Now, employers are perfectly prepared to live with the consequences of Supreme Court decisions, district court decisions and appellate court decisions. They have counsel. They could obtain advice. It's possible for them to make plans and to conduct their affairs accordingly. It is difficult, however, to do so when the agency who has its responsibility in terms of enforcement has one policy on the books and another policy in practice.

I think Dean Blumrosen has correctly pointed out that the affirmative action guidelines expressly indicate that the EEOC in the form of conciliation and settlement agreements itself, and I refer to section 1608.6, specifically authorized itself to enter into affirmative action agreements containing goals and timetables.

Therefore, I believe there is no real distpute or reasonable grounds for debate concerning the existence of agency policy permitting the use of goals and timetables. Of great concern to management is the fact that the EEOC is not at the same renouncing statistical proofs in connection with establishing discrimination. Certainly, the law of the United States is that statistics may be evidenced in discrimination cases to be accorded appropriate weight. While we may debate the appropriate uses, it is clear that they will continue to be used in title VII litigation. If statistics are useful in establishing discrimination, are they not also useful in establishing that it does not exist or that it has ceased to exist.

It is very important that these kinds of standards be permitted when employers voluntarily enter into conciliation or consent decrees. It's very important that management have incentives to settle. I will not restate all of my testimony on this point, but it think it is important to emphasize that a procedure by which only identified victims are entitled to relief as a mechanism for resolving employment discrimination is a prescription only for litigation.

In this case, management hotly and vigorously disputed that it had engaged in prohibitive practices. The decree contains no admission. There are no findings of fact that the employer did indeed act discriminatorily.

If we were required to advise our clients to cooperate and engage in affirmative action only on the basis of such an admission, then many companies would rather litigate than settle. If there is no arrangement for an employer to maintain some reasonable degree of control over its employment practices, as consent decrees clearly provide, then there will be little incentive not to litigate.

I would state in closing that it does appear that the EEOC with its policies is headed not toward the statutorily preferred mechanism of settlement and conciliation, but rather toward increased confrontation both with the plaintiffs and with management. Those of us in management who believe in title VII's purposes are concerned that the only losers in this scenario will be those who title VII was initially passed to protect. Thank you very much.

[The prepared statement of Gregory K. Hiestand follows:]

PREPARED STATEMENT OF GREGORY K. HIESTAND, ESQUIRE

Mr. Chairman, Members of the Sub-Committee, Ladies and Gentlemen:

I am pleased to testify before you concerning what appear to be recent changes in the policy of the Equal Employment Opportunity Commission ("EEOC" or "Commission") with respect to the role that employment related goals for minorities and women may play in resolving litigations arising under Title VII of the Civil Rights Acts of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Pending the outcome of the *Wygant v. Jackson Board of Education*, *cert. granted*, April 15, 1985, No. 84-1340; *Local 28, Sheet Metal Workers v. EEOC*, *cert. granted*, October 7, 1985, No. 84-1656; *Firefighters, Local No. 93 v. City of Cleveland*, *cert. granted*, October 17, 1985, No. 84-1999, cases now before the United States Supreme Court ("Supreme Court"), the EEOC has decided not to seek enforcement or adoption of any consent decree or judgment which provides for numerical or other relief to persons who are not themselves proven victims of discrimination. Moreover, there appears to be general disapproval by the current Commission of the use of goals as a remedial device. Such disapproval is reflected both in the language of the consent decree recently entered in the Southern District of New York in which I was counsel for the defendant and in the testimony of the acting general counsel and various Commissioners provided to this sub-committee on Tuesday of this week.

It is, of course, not the function of this hearing to inquire into matters now pending and awaiting decision by the federal courts. It is, however, appropriate to comment and inquire concerning EEOC policy and the processes used in its formulation.

Those in the private sector who are charged with the duty of complying with Title VII, managers of corporations which my firm and others like it represent, are entitled to certain conduct in the formulation of policy by the administrative agency charged with the obligation of enforcing Title VII. Specifically, management is entitled to publicly formulated policy which is clear. consistently applied and in conformity with applicable law. With respect to the now evident policy and practice of the EEOC disfavoring the use of goals in the context of resolutions to Title VII litigation, we have instead had an example of policy, clandestinely established, which is at the same time confusing and unduly confrontational. This is both surprising and sad.

Since Chairman Thomas' arrival at the Commission, in my view, the agency has been quite careful to publicly formulate and convey most of its changes in policy. While management may be concerned with some of the EEOC's new views, there has been a noticeable improvement in the willingness of the agency to "go public" with both its litigation strategy and its policies concerning the substantive content of Title VII. For whatever reason, the same cannot be said with respect to the issue of goals.

It is, of course, necessary to be clear concerning the differences between a goal and a quota. Properly speaking, a goal is the product of careful analyses and projections of hiring and promotion that will likely occur if recruitment and training efforts are taken to bring to the employment process increased numbers of qualified individuals who are members of previously "underutilized" groups. In my concept of a goal, non-discriminatory standards will be applied at the point of decision. A quota, on the other hand, reflects a result-oriented bottom-line approach to hiring or promotion. In this regard, I share Chairman Thomas' concern that a goal can easily be converted into a quota and, therefore, caution is entirely appropriate in this area. Indeed, the cases now before the Supreme Court will, no doubt, provide guidance with respect to the use of quotas. I, too, believe that a court should not engage in discrimination to remedy discrimination. Goals, however, while not uniformly appropriate, may prove quite helpful in monitoring compliance with the law, and resolve disputes over whether the law has been complied with. Where voluntarily adopted, even in a consent decree, they should be lawful.

I said the EEOC's current position is confusing. There is, I believe, evident inconsistency between the EEOC's current approach to goals, and the agency's own guidelines concerning voluntary affirmative action, including goals, promulgated immediately prior to the Supreme Court's decision in *United Steelworkers v. Weber*, 443, U.S. 193 (1979). As those who practice in this field are well aware, the Supreme Court there expressly upheld voluntary race or sex decision making in the private sector in certain specific limited circumstances. In short, *Weber* permits such voluntary action where the program (1) is voluntarily adopted by the parties, (2) derives from a particularized plan to eliminate racial or gender-based imbalances, (3) is designed to remedy areas of traditional job segregation, (4) does not unduly trammel the interests of non-minorities or males or create absolute bars to any group and (5) is temporary in design and not intended to establish a ratio. EEOC guidelines, too, expressly provide for "the establishment of a long term goal and short range interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market." 29 CFR §1608.5. Affirmative action programs containing such goals are expressly permitted in EEOC conciliation and settlement agreements under the guidelines. *Id.* §1608.6.

Of greater concern to management, however, is the fact that the EEOC has not renounced the use of statistical proofs in connection with establishing discrimination. Indeed, it is the pervasive use by plaintiffs and the EEOC of statistical evidence which has vitalized employer concern that management be permitted to engage in Weber protected affirmative action. Thus, the EEOC contends on the one hand that it is fully justified in erecting statistical proofs to establish discrimination, but that employers may not engage in a similar process as a preventive measure to reduce exposure to such litigation and to assure management that it is not unintentionally engaging in illegal conduct for which it may be ultimately hailed into court and held liable. This irony is compounded by the fact that the EEOC itself has been the leading proponent of statistical discrimination cases, which I might add recently resulted in the stinging rebuke by the United States District Court for the Northern District of Illinois to the EEOC in rejecting its claims against Sears Roebuck. EEOC v. Sears Roebuck & Co., 39 Fair Empl. Prac. Cas. (BNA) 1672 (N.D.Ill. 1986).

The EEOC's de facto policy appears to be at odds with the law of every circuit, with long standing agency precedent and 20 years of agency exhortations to the private sector to utilize goals as a means of assuring both its employees and itself that it does not engage in discrimination. In this respect, the agency's de facto policy on goals is unfortunately consistent with a long history of agency regulations at variance with statutory precepts. Indeed, case law is replete with examples where district and appellate courts, and indeed the Supreme Court, have refused to follow agency guidelines, precisely because such formal agency pronouncements are not consistent with the statute. Perhaps the structure of the Commission makes such controversies inevitable. The General Counsel, the chief law enforcement officer under § 705, receives a separate political appointment than do the members of the Commission. The General Counsel is statutorily responsible for the conduct of litigation, yet the guidelines which form the basis for agency policy are promulgated by the Commission itself.

Chairman Thomas was careful to note that he was awaiting decisions by the Supreme Court before proceeding further with goals. Were his position based solely on a cautious respect for the Supreme Court's role in determining the content of Title VII, I would agree. The comments of the Commission as a whole, however, make clear that more is involved. The EEOC seems poised to embark on a new round of challenges to employers' use of goals generally. In this regard, the EEOC appears to be unnecessarily combative. By Congressional determination, settlement, rather than litigation, is the preferred method of resolving employment discrimination claims. See, e.g., W.R. Grace & Co. v. Local 459, 461 U.S. 757, 700-71 (1983); Ford Motor Co. v. EEOC, 458 U.S.

219, 228 (1982); Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981). If the EEOC is resolved to abandon goals and instead seeks to "make whole" every purported victim of discrimination, then there will only be more litigation than now exists. Employers will be, at once, unable to avoid litigation (because they may not use goals), held accountable for statistical imbalances in their workforces and be unable to settle litigation without conceding full liability. The EEOC is not headed toward conciliation, but toward confrontation. Those of us in management who believe in Title VII's purpose are concerned that the only losers in this scenario will be those whom Title VII was initially passed to protect.

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Mr. **Martinez**. Thank you very much. I think you all feel there is a need to continue the timetables and goals and continue the policy that has been set in the past. As Mr. Blumrosen has suggested, if they are going to change it, do it public at a public meeting where there can be input and maybe persuasion from that maddening crowd that Thomas refers to maybe change their minds, and that's what we're all about trying to get them to do.

So that if there is some reading of the public differently that what the Congress reads it, then the Congress can do what it has to do in the way of legislation to make sure that the public's input doesn't fall on deaf ears.

There are questions that we do have of this panel. I have several, but because we have to go down on the floor and vote again, rather than hold you until we come back, I'd like to terminate it now and ask your indulgence to send you those questions and have you respond in writing. Would that be all right?

Mr. **Blumrosen**. We'd be happy to do that.

Mr. **Martinez**. Thank you very much.

[Whereupon, at 12:45 p.m., the subcommittee was adjourned.]